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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1202

INTERNATIONAL-STANLEY CORPORATION,
A NEBRASKA CORPORATION,
Appellant,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, GEORGE E. MAHIN AS DIRECTOR OF REVENUE OF THE STATE OF ILLINOIS, AND ALAN J. DIXON AS TREASURER OF THE STATE OF ILLINOIS.

ON APPEAL FROM THE APPELLATE COURT
OF ILLINOIS, FIRST DISTRICT

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion of the Appellate Court of Illinois (App. C, *infra*, p. A. 8) has been officially reported and appears at 40 Ill. App. 3d 397 (1st Dist. 1976) and 352 N. E. 2d 272 (Ill. App. 1976). The Circuit Court of Illinois delivered an opinion (App. A, *infra*, p. A1) which has not been officially reported.

JURISDICTION

International-Stanley Corporation ["Appellant"] filed suit in the Circuit Court of Cook County, Illinois, against the Department of Revenue of the State of Illinois seeking permanently to enjoin the Illinois Director of Revenue from assessing Illinois Retailers' Occupation Taxes against Appellant.

On July 24, 1974, the Circuit Court of Cook County entered final judgment in favor of Appellant granting it substantially all of its requested relief (App. B, *infra*, p. A. 6). On July 6, 1976, the Appellate Court of Illinois filed its opinion (App. C, *infra*, p. A. 8) and its order reversing the final judgment of the Circuit Court and remanding the case with directions (App. D, *infra*, p. A. 22).

A petition for leave to appeal (App. E, *infra*, p. A. 23) from the Appellate Court was filed with the Supreme Court of Illinois on August 30, 1976. On December 3, 1976, the Illinois Supreme Court entered its final order denying Appellant's said petition (App. F, *infra*, p. A. 38). Notice of Appeal to this Court was filed in the Appellate Court of Illinois, the Court possessed of the record, on January 21, 1977 (App. G, *infra*, p. A. 40).

Jurisdiction of the Supreme Court of the United States to review this case is conferred by 28 U. S. C. §§ 1257(2) and 2101(c).

Cases believed to sustain the jurisdiction of this Court include *Allenberg Cotton Co.* v. *Pittman*, 419 U. S. 20; *National Bellas Hess Inc.* v. *Department of Revenue of the State of Illinois*, 386 U. S. 753; *American Oil Co.* v. *Neill*, 380 U. S. 451; *Warren Trading Post Co.* v. *Arizona State Tax Commission*, 380 U. S. 685; *Central R. R. Co. of Pa.* v. *Pa.*, 370 U. S. 607; *Richfield Oil Corporation* v. *State Board of Equalization*,

329 U. S. 69; *Conn. General Life Insurance Company* v. *Johnson*, 303 U. S. 77; *Dahnke-Walker Milling Company* v. *Bondurant*, 257 U. S. 282; *American Express Company* v. *Iowa*, 196 U. S. 133; and *Bell's Gap R. R. Company* v. *Pa.*, 134 U. S. 232.

The validity of certain portions of the Illinois Retailers' Occupation Tax Act is involved. Since those statutory provisions are lengthy, their pertinent text is set forth at Appendix H, *infra*, p. A. 43. The provision of the Constitution of the United States relied upon by Appellant in the Illinois courts to invalidate those provisions of the Illinois Retailers' Occupation Tax Act as applied are set forth at Appendix I, *infra*, p. A. 44.

QUESTIONS PRESENTED

First Question

Is the assessment of an Illinois tax upon a business which is engaged in the retail occupation of selling "grain doors" to railroads violative of the Commerce Clause of the Constitution of the United States under the following circumstances:

1.1 The "grain doors" are intended to be used, and are only capable of being used, to enclose grain and other bulk commodities to be shipped in railroad boxcars.

1.2 The railroad purchasers order the grain doors to be shipped to outside-of-Illinois destinations where they will be installed by shippers to enclose shipments of grain and other bulk commodities.

1.3 All of the grain doors are in fact shipped to the intended outside-of-Illinois destinations where they are then installed in railroad boxcars to enclose grain and other bulk commodities which originate in said outside-of-Illinois destinations.

1.4 The State of Illinois does not even attempt to subject to its tax the gross receipts from any sales to railroads where the railroad purchasers do not, as carrier or otherwise, receive the grain doors within Illinois.

1.5 At issue here, however, is the fact that the tax has been assessed on gross receipts received by Appellant from sales by Appellant to railroad purchasers in either of two situations:

1.5.1 The purchasing railroad is the only available carrier at the point-of-origin of the shipments; therefore it receives on board its cars grain doors destined to be delivered to itself, outside of

Illinois, as purchaser; and delivery of the grain doors is then made to the originally-intended shipment destination points outside-of-Illinois.

1.5.2 The purchasing railroad, as carrier, accepts railroad cars loaded with grain doors at a within-Illinois switching point; those grain doors are destined to be delivered to said railroad outside of Illinois as purchaser; and delivery of the grain doors is then made to the originally-intended shipment destination points outside-of-Illinois.

Second Question

Is an assessment of the Illinois gross receipts Retailers' Occupation Tax against a retailer, most of whose retail occupation activities take place outside of Illinois, violative of the Commerce Clause of the Constitution of the United States in that it is the assessment of a gross receipts tax which is not apportioned between the within-Illinois and the outside-of-Illinois retail occupation activities of the taxpayer?

STATEMENT

The facts of the case as stated in the opinion of the Appellate Court of Illinois (App. C, *infra*, p. A. 8) are substantially correct except as corrected by Appellant in its Petition For Leave To Appeal (App. E, *infra*, at pp. A. 25-A. 29). The facts material to this Court's consideration of the questions presented by this appeal are as follows.

Appellant is a "retailer"—as that word is used in the Illinois Retailers' Occupation Tax Act—engaged in the sale of products to railroads for use in connection with shipment of grain and other loose, unpackaged commodities in bulk. Appellant's principal products—and the only ones at issue on this appeal—are "grain doors" which are corrugated paper panels which are nailed across the inside of railroad boxcar doorways to prevent bulk commodities, such as grain, from spilling out of freight cars during shipment.

All of the grain doors at issue on this appeal were ordered from Appellant by railroads to be shipped to destination points outside of Illinois. After reaching the shipment destination points outside of Illinois, the grain doors were then stored at various points along the railroads' rights-of-way; those storage points were generally at or near the points where shipment of the bulk products would commence. The grain doors were then installed by shippers of grain and other bulk commodities when the shippers loaded the railroad boxcars.

Installation of the grain doors is part of the process of loading railroad boxcars and the grain doors were installed by the shippers at their expense. If the railroads so elected, however, the railroads would install the grain doors for a charge to the shipper of $2.54 per car.

Grain doors are used only for one single continuous shipment and are not reused. Rates charged by the railroads for

shipment are subject to prior approval by the Interstate Commerce Commission and usually include a charge for the grain doors furnished to shippers by the railroads. Where the rates do not include such a charge, the railroads charge the shipper an additional fee for the grain doors.

Illinois did not attempt to tax Appellant's gross receipts from any sales to railroads where the railroad did not, as carrier, receive any of the freight cars loaded with grain doors within Illinois. This controversy concerns only the power of Illinois to tax Appellant's gross receipts from sales of grain doors to railroads which—notwithstanding that from the beginning the grain doors were to be shipped to outside-of-Illinois destinations and were in fact shipped to those destinations—were carried within Illinois by the purchasing railroad as carrier.

Raising and Decision of the Federal Questions

Paragraph 6(d) of the complaint filed in the Circuit Court alleged:

> "(d) In addition, the transactions in question are not subject to the Retailers' Occupation Tax Act in view of Section 2 of the Act which provides that the 'tax is not imposed on the privilege of engaging in any business in interstate commerce.' As set forth in paragraph 6(c) above, commercial activity relating to each transaction occurs outside the State of Illinois and the business situs for the purpose of Retailers' Occupation Tax Act is Nebraska and not Illinois. In addition, the plaintiff with respect to the transactions in question has not engaged and is not now engaging in any activity in Illinois which is not an integral part of interstate commerce. The Retailers' Occupation Tax Act is void as applied to the transactions in question in that such application would be in violation of both the Due Process and Commerce clauses of the United States Constitution (14th Amend. and Art. 1, § 8, cl. 3, U.S. Const.) in that the Act does not provide for a fair apportioning of the tax between activities occurring within the State of Illinois and outside the State of Illinois; that there is no connection between the tax and the transac-

tion within the State of Illinois for which the tax is an exaction; and that such tax is an unfair burden on interstate commerce."

The opinion of the Circuit Court (App. A, *infra*, p. A. 1) in part held (App. A, *infra*, at pp. A. 2, A. 4):

> "Effective prior to 1961 (and since) Sec. 441 of Illinois Retailers Occupation Tax Act, ch. 120, Ill. Rev. Stat. 1971, has excluded imposition of that tax:
>
> > 'However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not under the constitution and statutes of the United States, be made the subject of taxation by this State.'
>
> * * *
>
> Those transactions, during the period involved here, come within the interstate commerce exception to tax imposition intended by Section 441 of the Retailers Occupation Tax Act, continually in effect in this State since prior to 1961. (ch. 120, Ill. Rev. Stat. 1971.)"

In resisting the Illinois Department of Revenue's appeal to the Appellate Court, Appellant again relied heavily upon the federal infirmities of the Illinois tax assessments. Appellant's original brief filed in the Appellate Court, for example, included twenty pages of discussion of the following two points:

I.

The Trial Court Correctly Held That the Commerce Clause Prohibits Taxation of Those Transactions Wherein the Grain Doors Are Attached to and Become Part of Rolling Stock Moving in Interstate Commerce

* * *

IV.

The Trial Court Erred in Failing to Hold That the Commerce Clause Forbids Imposition of an Illinois Retailers' Occupation Tax on Plaintiff Because it Would Tax Plaintiff's Gross Receipts from Interstate Commerce

Without Apportionment Between the Fraction of Plaintiff's Occupation Conducted Within Illinois and the Part Which Takes Place Outside of Illinois Only

The first point was, of course, made by Appellant in its status as Appellee in the Appellate Court; the fourth point was made by Appellant as Cross-Appellant in that proceeding.

Appellant's Reply Brief filed in the Appellate Court also raised the constitutional question when it discussed at pages 3 through 11 the following proposition:

"II.

"Assuming *Arguendo* That the Grain Doors Were 'Delivered' in Illinois to the Railroads, That Local Incident Is Not Enough to Immunize the Tax from a Violation of the Commerce Clause"

The opinion of the Appellate Court recognized Appellant's arguments when it stated (App. C, *infra*, at p. A. 12):

> "Plaintiff urges that the trial court correctly held that the commerce clause of the United States Constitution prohibits taxation of those grain doors which become part of rolling stock moving in interstate commerce; * * * [and that] the trial court erred in failing to hold that the Interstate Commerce Clause forbids imposition of Retailers' Occupation Tax because plaintiff's receipts from interstate commerce would be taxed without apportionment between the portion of plaintiff's occupation conducted within Illinois and the portion conducted outside of the state * * *."

The Appellate Court of Illinois did not consider the many landmark cases relied upon by Appellant. Instead its opinion merely ended with a pronouncement (App. C, *infra*, at p. A. 19):

> "We conclude that imposition of the tax by defendant on sales within category 3 [*i.e.*, where 'the railroad takes delivery of the grain doors in Illinois but transports them out of the State where functional use will then begin.'] is within constitutional requirements."

In its Petition for Leave to Appeal (App. E, *infra*, p. A. 23) filed with the Supreme Court of Illinois, Appellant again relied upon the Commerce Clause to invalidate the Illinois tax (App. E, *infra*, at p. A. 24):

> "3. The points relied upon for reversal of the judgment of the Appellate Court are the following:
>
> * * *
>
> "3.4 The Appellate Court erred in holding that imposition of the Illinois Retailers' Occupation Tax did not constitute an impermissible burden upon interstate commerce contrary to the Commerce Clause of the Constitution of the United States.
>
> "3.5 The Appellate Court erred in holding that the Illinois Retailers' Occupation Tax, as applied in this case, was not an impermissible, unapportioned tax on gross receipts arising from interstate commerce contrary to the Commerce Clause of the Constitution of the United States."

Notwithstanding Appellant's reliance on the Constitution of the United States, however, the Petition for Leave to Appeal was denied without comment by the Supreme Court of Illinois (App. F, *infra*, p. A. 38).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This is not an Illinois Use Tax case as was *United Airlines* v. *Mahin*, 410 U. S. 623. The reason is that it was not until 1967 that the Illinois Retailers' Occupation Tax Act ["ROTA"] was amended specifically to exclude from that tax gross receipts from sales of rolling stock which would be used in interstate commerce. Unlike the ROTA, however, the Illinois Use Tax Act had always included a specific exemption for such rolling stock [Bulletin of the Illinois Department of Revenue published July 7, 1967]:

> "Effective July 1, 1967, the same rolling stock exemption that has been in the Use Tax Act has been included in the Retailers' Occupation Tax Act. This means that retailers may sell transportation equipment * * * to interstate carriers for hire tax-free, notwithstanding the fact that the property is delivered to the purchaser in Illinois, if such purchasing carrier certifies to the retailer that such property will be used by the purchaser as rolling stock moving in interstate commerce. * * *"

When the Appellate Court reversed the Circuit Court's holding that the Commerce Clause prohibited the Illinois tax, it reasoned that since the ROTA contained no specific rolling stock exemption until 1967, necessarily Illinois must have had power to assess its Retailers' Occupation Tax unencumbered by Commerce Clause limitations. The Appellate Court ignored the fact that at least since 1910 rolling stock had been recognized as an instrumentality of interstate commerce. *Interstate Commerce Commission* v. *Ill. Central R. R. Company*, 215 U. S. 452, 474.

The reasons why the federal questions presented are so substantial as to require plenary consideration are as follows.

First Question

In holding that imposition of the Illinois tax did not violate the Commerce Clause, the Illinois Appellate Court disregarded and rejected—without comment—the many "stream of commerce" cases decided over the years by this Court. If those cases can be rejected with impunity by the state courts—as occurred here—they are almost meaningless as a factor of importance in state tax law.

The Illinois courts have held that a tax may be assessed because the grain doors were "delivered" within Illinois to the railroads——albeit in their capacities as carriers—notwithstanding that they were to be carried to destinations outside of Illinois and notwithstanding that they were in fact so carried. The apparent reasoning—although it is obscure and has not been expressed—is that the railroad purchasers who—as carriers—received their grain doors within Illinois received "title" to them within that state.

The Appellate Court's theory that the tax assessed here is proper because the local incident of "delivery" occurs within Illinois—assuming *arguendo* that that conclusion is correct—is contrary to a long and unbroken chain of "stream of commerce" cases of this Court. It has never been held that the flowage of the stream of interstate commerce may be impeded by such attenuated reasoning.

The question presented in *Swift & Co.* v. *United States,* 196 U. S. 375, was whether Congress had power to regulate the stockyards. The lawyer for the stockyards argued that since the deliveries by defendant meat packers were to carriers as agents for the purchasers, and those deliveries were within Illinois, those deliveries were not any part of interstate transportation since the stream of commerce had not yet commenced. Mr. Justice Holmes writing for the Court rejected that argument [196 U. S. 375 at 398]:

> "* * * [C]ommerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce. * * * "

Technical concepts of "delivery" were again held to be irrelevant in *Rearick* v. *Pa.,* 203 U. S. 507, 512. There an Ohio corporation employed an agent to solicit in Pennsylvania orders for groceries and brooms. Orders were filled from the Ohio business headquarters by sending them from Ohio to the seller's agent in Pennsylvania. The purchasers were not obligated to accept the goods until actual delivery to them at which time the goods could be rejected if not according to sample. The state argued that since legal delivery did not take place until the customers decided not to exercise their power of rejection, a local license tax was valid. The Supreme Court held to the contrary; writing for a unanimous Court, Mr. Justice Holmes once again refused the invitation to decide the case by technicalities of ownership and delivery.

Texas & New Orleans R. R. Co. v. *Sabine Tram Co.,* 227 U. S. 111, 126, held that lumber purchased in Texas for the purpose of filling foreign orders was in the stream of commerce even though no contract prevented the purchaser from changing its destination. The Court held that the fact that the lumber was shipped on local bills of lading from one point in Texas to another point in Texas did not convert the shipments into intrastate commerce.

The Pipe Line Cases, 234 U. S. 548, 560, affirmed the proposition that a stream of interstate commerce flows even though a carrier itself owns the article which it transports across state lines. In *Heyman* v. *Hays,* 236 U. S. 178, 187, the State of Tennessee sought to uphold a liquor tax assessed

against a Tennessee company which limited its business to filling mail orders received from residents of other states. The tax was sought to be upheld by arguments that under Tennessee law, delivery to a common carrier was delivery to the purchaser, hence there was no stream of commerce with which the tax interfered. Mr. Chief Justice White, writing for a unanimous Court, found no difficulty at all in holding the tax to be violative of the Commerce Clause and that technical concepts of ownership, title and delivery were irrelevant.

The State's theory appears to be that railroad purchasers which received grain doors in Illinois are to be treated differently from other railroad purchasers because they had a power to control use of the grain doors by rerouting them to an Illinois destination and use. But the law has been clear from at least the time of *United Fuel Gas Company* v. *Hallanan,* 257 U. S. 277, 281, that a stream of interstate commerce is not affected by the right of a carrier-purchaser to divert the article being transported to destinations and uses within the taxing state. United Fuel Gas Company, after gathering and purchasing natural gas mostly in West Virginia, distributed it through its pipelines located in that state. Mr. Justice Holmes, writing for the Court, rejected the argument that there was no stream of interstate commerce, hence the tax was justified, because the taxpayer-carrier also owned the gas being transported.

In this case the stream of interstate commerce started when Appellant sold the grain doors to its railroad customers. In *Dahnke-Walker Milling Company* v. *Bondurant,* 257 U. S. 282, 290-291, 292, Dahnke-Walker, a Tennessee company, contracted with a resident of Kentucky for the purchase of grain, delivery to the milling company to be accomplished by placing the grain on board the cars of a common carrier in Kentucky. When the Kentucky seller breached the contract, Dahnke-Walker sued but it was argued that the Kentucky courts were closed to it because it had engaged in intrastate business in Kentucky without a license to do so. This Court, reversing the Kentucky Court of Appeals, held that the purchase itself started flowage of the stream of commerce.

In *Lemke* v. *Farmers Grain Company,* 258 U. S. 50, 54-55, 58-59, the grain company purchased grain in North Dakota, placed it in a North Dakota elevator, loaded it on rail cars, and shipped it to other states for sale. Even after loading, the grain was subject to diversion and local sale in North Dakota. A North Dakota statute required purchasers to obtain a license and pay a license fee but Farmers Grain Company argued that the licensing system violated the Commerce Clause. The United States Court of Appeals for the Eighth Circuit agreed and this Court affirmed, rejecting the State's argument that the license fee was proper because the grain company was under no obligation to send the grain outside the state but could instead have sold it separately.

The important case of *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U. S. 69, recognized that a state tax is invalid if it seeks to tax a local incident—such as the delivery of an item into the vehicle of a foreign purchaser—which is a step in the stream of commerce itself. There California assessed a retail sales tax against a California company which had entered into a contract with the New Zealand Government for the sale of oil. The oil was carried by Richfield's pipeline to storage tanks at the Los Angeles harbor; from there the oil was pumped into storage tanks of a tank steamer owned by the purchaser. The oil then was transported to New Zealand and none of it was used or consumed in the United States. In holding that assessment of the California retail sales tax was violative of the Import-Export Clause, this Court rejected California's argument that the tax should be upheld as an intrastate transaction because the delivery in California was to the purchaser itself rather than to an independent carrier [329 U. S. at 82-83]:

> "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad.

> Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad. It is true, as the Supreme Court of California observed, that at the time of the delivery the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use. It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. The means of shipment are unimportant so long as the certainty of the foreign destination is plain."

By its emphasis upon "delivery" within Illinois, the Department of Revenue seeks to isolate the incident of loading as being determinative in the assessment of a tax:

> (1) if grain doors are loaded onto a carrier other than the purchasing railroad, which will carry them in a continuous journey to an out-of-Illinois destination, then there will be no tax; but
>
> (2) if grain doors are loaded either onto cars of a purchasing railroad or onto cars which will be turned over to a purchasing railroad within Illinois, then a tax is properly assessed even though the grain doors are transported—as originally intended—to shipment destination points outside of Illinois.

The constitutional invalidity under the Commerce Clause of this theory was stressed in *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 427-428, 429, 433.

Another case which reveals the basic defects in the Department's theory is that of *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, 347 U. S. 157. There the "delivery" which took place in the taxing state, Texas, was in the form of flowage or of "gathering" gas into Texas pipelines from whence it would

be transported to other states. The Supreme Court held that the taking of the gas within Texas was part of the stream of commerce, hence was not an incident which would sanction a state tax [347 U. S. at 166-167]:

> "* * * It is now well-settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate commerce, the flow of commerce, that it cannot realistically be separated from it. * * *
>
> * * *
>
> "* * * This economic process is inherently unsusceptible of division into a distinct local activity capable of forming the basis for the tax here imposed, on the one hand, and a separate movement in commerce on the other. It is difficult to conceive of a factual situation where the incidence of taking or loading for transmission is more closely related to the transmission itself. * * *"

The Revenue Department's theory of this case is subject to another infirmity: it has failed to recognize that a determination of precisely when a stream of commerce begins and ends is dependent upon the nature and purpose of the article being transported across state lines. *York Manufacturing Company* v. *Colley*, 247 U. S. 21, recognized the premise that interstate commerce continues until an article comes to the end of its interstate journey and is available for the functional use for which originally intended. The Texas Court of Civil Appeals had held that a Pennsylvania corporation could not bring suit in Texas because it had not acquired a Texas permit to do business. The company had sold a complicated ice-making plant which had been delivered in Texas to a Texas company. Subsequently the seller came into Texas for three weeks during which time it erected the plant. Reversing the Texas court, the Supreme Court held that the stream of commerce had not ended because the "inherent and intrinsic" [247 U. S. at 26] nature of the item sold determined the flowage of the stream of commerce.

At all times the inherent and intrinsic character of the grain doors required their carriage to the great grain producing states of the west where they were then installed in railroad boxcars to enclose and safeguard shipments of grain which originated in those western states.

Second Question

The second federal question presented is also substantial. The great bulk of Appellant's occupational activities takes place in Nebraska yet the Illinois Department of Revenue seeks to collect Retailers' Occupation Taxes from Appellant just as if all of its occupational activities—like those of Field's or Carson's—took place within Illinois. Since there was no apportionment of the tax between Appellant's activities which took place within and without Illinois, assessment of the tax against Appellant is fatally defective.

The Illinois Retailers' Occupation Tax is, as this Court recently recognized, a "gross receipts tax on retailers." *Standard Pressed Steel Co.* v. *Department of Revenue,* 419 U. S. 560, 562. In that case this Court also took care to emphasize that the unapportioned Washington business and occupational tax on gross receipts as applied there was "* * * 'apportioned exactly to the activities taxed' all of which are intrastate." 419 U. S. 560 at 564. There is no similar apportionment here.

Assessment of an unapportioned gross receipts tax upon interstate commerce is such a blatant violation of the Commerce Clause that a recent such case was disposed of by this Court in a unanimous, *per curiam* opinion. *Evco* v. *Jones,* 409 U. S. 91, 93-94. See also, *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434, 438; *J. D. Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, 311.

Assessment of the Illinois gross receipts Retailers' Occupation Tax against Appellant here is especially improper because the tax is assessed by the state of origin of the grain doors and not by the market state. See the concurring opinion of Mr.

Justice Rutledge in *Freeman* v. *Hewit,* 329 U. S. 249, 281, 283. Even if a case like *General Motors Corporation* v. *Washington,* 377 U. S. 436, were in point here, it would be important to recognize that such a case concerns taxes assessed by the market state which, by definition, enriches the coffers of the taxpayer. That is not true here, of course, because it is the shippers in the states of destination who pay for the grain doors. Illinois seeks to assess an unapportioned gross receipts tax with respect to transactions for which it provides no market.

CONCLUSION.

The federal questions presented by this appeal are substantial and are of general and public importance. Unless it is believed that cases such as *United Fuel Gas Company* v. *Hallanan,* 257 U. S. 277, 281, *Lemke* v. *Farmers Grain Company,* 258 U. S. 50, 54-55, 58-59, and *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434, 438, warrant a summary reversal of the decision of the Appellate Court of Illinois, probable jurisdiction should be noted.

Respectfully submitted,

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March 1, 1977

APPENDIX A.

STATE OF ILLINOIS } ss.
COUNTY OF COOK }

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Chancery-Tax Division

INTERNATIONAL-STANLEY CORPORATION, a Nebraska corporation, *Plaintiff,* *vs.* DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, GEORGE E. MAHIN, as Director of Revenue of the State of Illinois, and ALAN J. DIXON, as Treasurer of the State of Illinois, *Defendants.*	No. 64 CH 6562

OPINION

THE COURT FINDS THAT:

No significant question or issue of fact appears.

The period of assessment involved here is sometime prior to 1961 through June 1967.

Subsequent to June 1967 Defendant no longer deemed any of the transactions involved here to be subject to the taxes sought to be imposed here.

Prior to July 1, 1961, Section 439.3(b) of Illinois Use Tax Act, ch. 120, Ill. Rev. Stat. 1959, in part pertinent here, excluded imposition of Use tax from:

"the use, in this State, of tangible personal property which is acquired outside the State and which is moved into this State for use as rolling stock moving in interstate commerce; . . ."

Effective July 1, 1961, Section 439.3 (Use Tax Act) was amended to define the term "acquired outside this State" to mean:

"Acquired outside this State", whenever used in this Section, in addition to its usual and popular meaning, shall include the delivery, outside Illinois, of tangible personal property that is purchased in this State and delivered from a point in this State to the point of delivery outside this State."

Effective July 1, 1967, Section 439.3(b) (Use Tax Act) was amended (S. B. No. 644) to substitute the words "by an interstate carrier for hire" in lieu of "which is acquired outside this State and which is moved into this State for use"—so that clause (b) effective July 1, 1967, then excluded the imposition of Use tax from:

"(b) the use, in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce; . . . ."

Clause (b) of Section 439.3, ch. 120 (Illinois Use Tax Act), was amended effective August 17, 1968, to additionally exclude certain leasing transactions from imposition of that tax:

"(b) the use in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce or by lessor under a lease of one year or longer executed or in effect at the time of purchase of tangible personal property to interstate carriers for-hire for use as rolling stock moving in interstate commerce as long as so used by such interstate carriers for-hire."

Effective prior to 1961 (and since) Sec. 441 of Illinois Retailers Occupation Tax Act, ch. 120, Ill. Rev. Stat. 1971, has excluded imposition of that tax:

"However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not under the constitution and statutes of the United States, be made the subject of taxation by this State."

Effective July 1, 1967, Sec. 441 (S. B. 643) was amended specifically to exclude the imposition of retailers occupation tax from:

". . . the proceeds from sales of tangible personal property to interstate carriers for hire for use as rolling stock moving in interstate commerce."

August 17, 1968, Sec. 441 of the Retailers Occupation Tax Act was also amended, and reads identically to clause (b) of Section 439.3 of Illinois Use Tax Act set out above.

SERVICE OCCUPATION AND USE TAX ACTS

Effective August 1, 1961, (and since) Illinois Service Use Tax Act, clause (b) of Section 439.33, Ch. 120 Ill. Rev. Stat. 1971, has excluded from imposition of that tax:

"(b) the use in this State, of property which is acquired outside this State and which is moved into this State for use as rolling stock moving in interstate commerce; . . ."

Effective August 1, 1967, Section 439.32 of the Service Use Tax Act was amended to except from "Sale of Service":

"(4) a sale or transfer of tangible personal property as an incident to the rendering of service for interstate carriers for hire for use as rolling stock moving in interstate commerce or by lessors under a lease of one year or longer, executed or in effect at the time of purchase of personal property to interstate carriers for hire for use as rolling stock moving in interstate commerce so long as so used by such interstate carriers for hire."

Effective August 1, 1961, (and since) Section 439.103 of Illinois Service Occupation Tax Act (ch. 120, Ill. Rev. Stat. 1961) has excepted that tax from:

"However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or

otherwise, which business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State."

Effective August 17, 1968, Section 439.102 of Illinois Service Occupation Tax Act was amended to except from the definition of "Sale of Service":

"(d) a sale or transfer of tangible personal property as an incident to the rendering of service for interstate carriers for hire for use as rolling stock moving in interstate commerce or lessors under leases of one year or longer, executed or in effect at the time of purchase, to interstate carriers for hire for use as rolling stock moving in interstate commerce."

From the foregoing legislative history of these statutes it appears that for a long period prior to the commencement of the period of assessment involved here, and ever since such time, the Retailers Occupation Tax Statute has expressly recognized the intendment of that statute not to interfere with or to unduly burden the privilege of engaging in any business in interstate commerce. (Sec. 441, ch. 120, Ill. Rev. Stat. 1971). That statute is declarative of the law, both State and Federal, governing the area of tax imposition permissible to the States.

It also appears that prior to July 1, 1961, and ever since, Illinois, in this regard, has recognized that the area of tax imposition, concerning interstate commerce, permissible to Illinois, does not include transactions including tangible personal property used as rolling stock moving in interstate commerce.

It appears to this court that the tangible personal property involved here is attached to and becomes part of rolling stock, and as to those transactions wherein that tangible personal property becomes part of rolling stock moving in interstate commerce, plaintiff is engaged in interstate commerce activities and its Illinois activities are in furtherance of and are part of the movement of rolling stock in interstate commerce.

Those transactions, during the period involved here, come within the interstate commerce exception to tax imposition in-

tended by Section 441 of the Retailers Occupation Tax Act, continually in effect in this State since prior to 1961. (ch. 120, Ill. Rev. Stat. 1971).

For the same reason those transactions are not subject to Illinois Use Tax (Sec. 439, et seq., ch. 120, Ill. Rev. Stat. 1971); nor are those transactions subject to Illinois Service Occupation tax or Service Use tax. (Sec. 439.103, ch. 120, Ill. Rev. Stat. 1971).

However, in the opinion of this court, those transactions, wherein the subject tangible personal property, during the period involved, became attached to and was made part of rolling stock in this State *not* moving in interstate commerce, are not conprehended within the pertinent Illinois statutory "interstate commerce" exceptions nor does this court find that the imposition of tax in those situations is denied by the law applicable thereto.

As to such transactions, this court finds plaintiff to be subject to Illinois Retailers Occupation Tax.

APPENDIX B.

STATE OF ILLINOIS } ss.
COUNTY OF COOK }

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Chancery-Tax Division

INTERNATIONAL-STANLEY CORPORATION, a Nebraska corporation, *Plaintiff,* *vs.* DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, GEORGE E. MAHIN, as Director of Revenue of the State of Illinois and ALAN J. DIXON, as Treasurer of the State of Illinois, *Defendants.*	No. 64 CH 6562.

FINAL JUDGMENT

This Matter coming on to be heard on a Stipulation of Facts and a full and complete trial of all of the issues between the parties; the Court having jurisdiction over the parties and the subject matter; counsel for both parties being present and after full and complete hearings:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

(1) Those transactions wherein the tangible personal property ("grain doors") are attached to and become part of rolling stock moving in interstate commerce are not subject to Illinois Retailers Occupation Taxes

or Illinois Use Taxes since they are within the Interstate Commerce exception to tax imposition.

(2) Those transactions wherein the tangible personal property ("grain doors") become attached to and are made a part of rolling stock not moving in Interstate Commerce are properly subject to Illinois Retailers Occupation Taxes and Illinois Use Taxes.

(3) The FINAL JUDGMENT covers and adjudicates all matters at issue in this case; but the Court retains jurisdiction for the sole purpose of determining if amounts of tax and refund computed by the parties are in accordance with this FINAL JUDGMENT.

(4) It is hereby ordered that the written opinion heretofore rendered by this Court on March 26, 1974 is hereby made a part of, and is incorporated herein, this FINAL JUDGMENT.

(5) The Court expressly finds that there is no just reason for delaying enforcement or appeal of this FINAL JUDGMENT.

Enter: RAYMOND S. SARNOW
Judge

Dated: July 24, 1974.

APPENDIX C.

61008

INTERNATIONAL-STANLEY CORP.,
Plaintiff-Appellee, Cross-Appellant,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, GEORGE E. MAHIN, as Director of Revenue of the State of Illinois, et al.,
Defendants-Appellants, Cross-Appellees.

Appeal from the Circuit Court of Cook County.

Honorable Raymond S. Sarnow, Judge Presiding.

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

International-Stanley Corporation (plaintiff) paid certain assessments to the Illinois Department of Revenue (defendant), under protest. (Ill. Rev. Stat. 1975, ch. 127, par. 172.) The assessments related to the Retailers' Occupation Tax Act (Ill. Rev. Stat. 1975, ch. 120, par. 440 *et seq.*) and the Use Tax Act (Ill. Rev. Stat. 1975, ch. 120, par. 439.1 *et seq.*) On plaintiff's complaint seeking declaratory and injunctional relief, the circuit court held that those transactions in which the tangible personal property allegedly sold by plaintiff was attached to and became part of rolling stock moving in interstate commerce were not subject to either tax; but, conversely, that those transactions in which tangible personal property was attached to and made a part of rolling stock not moving in interstate commerce were subject to both types of taxes. Defendant appeals and plaintiff cross-appeals.

The pertinent facts appear from a stipulation entered into by the parties before trial and from testimony at trial. Plaintiff is a corporation engaged in the sale of products to railroads for use in connection with shipment of grain and other loose, unpackaged commodities in bulk. The plaintiff's products are grain doors, hopper car covers and the tools and accessories used in connection therewith. Grain doors are corrugated paper panels which are nailed across the inside of railroad boxcar doorways or used to line weakened inside walls of railroad freight cars. Hopper car covers are used to cover open-top railroad cars. In addition, plaintiff sells tools and accessories used in connection with the installation of these grain doors and hopper car covers.

The plaintiff's railroad customers furnish the grain doors, hopper car covers and accessories to bulk shippers. This protects open-car shipments from the elements and prevents loose products, such as grain, from spilling out of freight cars; thus enabling the common carrier railroads to "furnish safe and adequate car service" in compliance with federal law. 49 U. S. C. § 1(11)(1959).

Regarding shipment and delivery of the grain doors, the parties stipulated that after the doors are delivered to the railroad they are stored at various points along the railroad line pending redelivery to the shippers. These storage points are generally at or near the point where shipment of the bulk product commences. The grain doors are then delivered to shippers along with empty railroad freight cars.

The tariffs provide that the grain doors are to be installed by the shipper at its own expense. But, when the shipper so elects, the railroad will install the grain doors at the point of loading for a charge of $2.54 per car. It is also stipulated that the installation of the grain doors and accessories is "part of the process of loading the freight car." The doors and accessories are used only for one single continuous shipment and are not reused. Rates charged by the railroads for shipment are subject to prior approval by the Interstate Commerce Com-

mission. Generally the rates, as approved, include a charge for the grain doors and accessories furnished to shippers by the railroads. In those few instances where a charge is not included in the rate, the railroad charges the shipper an additional fee for the grain doors and accessories. There was testimony at trial that this extra fee situation is limited to those instances where freight is carried "cross town" within the same terminal.

Plaintiff is a Nebraska corporation owned equally by International Paper Company, a New York corporation, and The Stanley Works, a Connecticut corporation, both of which are licensed to do business in Illinois. The grain doors are manufactured by International Paper at its plant in Illinois. The hopper car covers are manufactured at its plant in Arkansas. The accessories and tools are manufactured by Stanley Works at its Illinois plant. Upon completion of tools and accessories they are shipped to the International Paper plant in Illinois for storage pending further shipment. While thus in storage in Illinois, these items are included in plaintiff's inventory.

Plaintiff employs three salesmen and three engineers who work almost exclusively in Illinois. The salesmen generate and solicit orders. The engineers familiarize users of the grain doors with installation and investigate complaints about these items. The salesmen have no authority to accept orders from plaintiff's customer railroads. Instead, all customers prepare purchase orders which are sent directly to plaintiff's Nebraska office. Although plaintiff is under no duty to accept an order from a customer railroad, it has not rejected any such order within memory. The parties also stipulated that it is difficult to conceive of a situation in which an order would be rejected. Similarly, payment of plaintiff's invoices are made to plaintiff's Nebraska office where collection of accounts originates.

There are five distinct fact patterns regarding shipment and delivery of the grain doors and hopper car covers which are pertinent to this appeal:

1). The customer railroad takes delivery of the grain doors outside of Illinois and functional use of the doors commences outside of Illinois.[1]

2). The railroad takes delivery of the grain doors in Illinois where functional use begins.

3). The railroad takes delivery of the grain doors in Illinois but transports them out of the State where functional use will then begin.

4). The railroad takes delivery of the doors outside of Illinois but brings them into Illinois where functional use begins.

5). Hopper car covers, manufactured by International Paper in Arkansas, are delivered to railroads in Illinois to fill orders received by plaintiff.

The parties have agreed that the transactions in category number 1 are not subject to Illinois Retailers' Occupation Tax or Use Tax. As will later be detailed, categories 2, 3 and 4 form the issues concerning assessment of Retailers' Occupation Tax. Illinois Use Tax comes directly into question primarily with regard to the hopper car covers in category 5.

In September 1964, the Illinois Department of Revenue audited plaintiff's books and records. The Department subsequently notified plaintiff that it was liable for $208,335.96 under the Illinois Retailers' Occupation and Use Tax Acts, for the period from January 1, 1961 through January 31, 1964. Plaintiff paid this amount under protest. Various additional assessments were made and are to be included in the disposition made thereof by this opinion.

On November 13, 1964, plaintiff filed a complaint in the circuit court seeking an adjudication that its sales of grain doors were not subject to either Retailers' Occupation or Use Taxes. Plaintiff prayed injunctive relief restraining defendant from collecting such taxes from plaintiff. Plaintiff further prayed a

1. Functional use of the grain doors is deemed to begin when they are affixed to the freight cars prior to loading of the cars.

refund of all amounts paid. On November 16, 1964, the trial court enjoined defendant from disbursement and use of these payments and of any future amounts paid by plaintiff under protest in connection with its sales of grain doors and accessories.

In this court, defendant contends that plaintiff's sales of grain doors were subject to taxation under the Illinois Retailers' Occupation Tax Act; the application of that tax does not burden interstate commerce; the grain doors sold to the railroads by plaintiff were not "resold" by the railroads within the meaning of the Retailers' Occupation Tax Act; plaintiff's sales of grain doors and hopper car covers were subject to taxation under the Illinois Use Tax Act and plaintiff's sales were not exempt from taxation under the statutory exemption for rolling stock moving in interstate commerce.

Plaintiff urges that the trial court correctly held that the commerce clause of the United States Constitution prohibits taxation of those grain doors which become part of rolling stock moving in interstate commerce; the trial court erred in failing to hold that plaintiff was not a retailer at all; even assuming arguendo that plaintiff was a retailer, the trial court erred in failing to hold that plaintiff is not liable for Retailers' Occupation Taxes since it is not engaged in a retail occupation within Illinois; the trial court erred in failing to hold that the Interstate Commerce Clause forbids imposition of Retailers' Occupation Tax because plaintiff's receipts from interstate commerce would be taxed without apportionment between the portion of plaintiff's occupation conducted within Illinois and the portion conducted outside of the State; and the trial court erred in failing to hold that because of the rolling stock exemption in the Illinois Use Tax Act, the railroads incurred no use tax liability and plaintiff had no liability to collect use taxes from the railroads.

Both the Retailers' Occupation Tax Act (herein "ROTA", Ill. Rev. Stat. 1975, ch. 120, par. 440 *et seq.*) and the Use Tax Act, (herein "UTA", Ill. Rev. Stat., 1975, ch. 120, par. 439.1 *et seq.*) impose taxation only in the event of a retail sale. The

ROTA defines a sale at retail as a sale "for the purpose of use or consumption, and not for the purpose of resale * * *, for a valuable consideration." (Ill. Rev. Stat. 1975, ch. 120, par. 440.) The UTA definition of a retail sale is a sale "for the purpose of use, and not for the purpose of resale * * *, for a valuable consideration." (Ill. Rev. Stat. 1975, ch. 120, par. 439.2.) Plaintiff contends in its cross-appeal that it sells grain doors and related items to railroads for resale and not for use or consumption so that neither tax is applicable. This raises the initial issue as to whether plaintiff sells grain doors and accessories and hopper car covers at retail within the meaning of the statutes with particular reference to categories 2, 3, 4 and 5 above.

Plaintiff has cited a mass of authority regarding this issue. A discussion of all or even most of the cases cited would be impossible for reasons of space limitation. Our study has led us to conclude that the opinion of the Supreme Court of Illinois in *American Airlines* v. *Dept. of Revenue* (1974), 58 Ill. 2d 251, 319 N. E. 2d 28, is dispositive of plaintiff's contention in this regard. In *American Airlines* plaintiff purchased food from a supplier to be served to passengers in flight. The passengers were not charged additional sums for these meals beyond the cost of their tickets. The court stated that "a sale is one for use and consumption and not for resale, even though the purchaser transfers the commodity purchased, provided he does not transfer it for a direct and specific consideration." (58 Ill. 2d 251, 257, quoting from *Fefferman* v. *Marohn* (1951), 408 Ill. 542, 547, 97 N. E. 2d 785.) The Supreme Court thus held that, although passengers paid a fare which included a charge for meals, the airline was essentially selling transportation and there was no sale of meals by them within the meaning of the ROTA.

Similarly, in the instant action, the grain door covers and related items are furnished to the shippers by the railroads without additional charge but are included in the tariffs charged for railroad transportation. The railroads which purchase grain doors from plaintiff are essentially selling shipping services re-

garding which acquisition and disposition of the grain doors is merely incidental.

Plaintiff cites and depends upon Rule 50, par. 2, promulgated by the defendant. This rule provides, in effect, that where tangible personal property is sold to purchasers who transfer it to others, along with services for which a charge is made, this property is being sold or transferred for purposes of resale and thus the sellers or transferors are not liable under ROTA. Plaintiff reasons from this rule that it is merely transferring the grain doors to the railroads who in turn transfer them to the shippers, together with transportation service for which a charge is made, so that plaintiff should not be liable under ROTA. In our opinion, this Rule 50 is not applicable in the case before us. Rule 50, according to its title, is applicable to "vendors of tangible personal property employed for premiums, advertising, prizes, etc." We reject plaintiff's contention that it employs the grain doors for premiums, advertising, prizes or for any allied or similar use within the purview of Rule 50. No such situation is presented by the case before us. Our rejection is based in part upon *Boye Needle Co.* v. *Dept. of Revenue* (1970), 45 Ill. 2d 484, 259 N. E. 2d 278, where the court considered a situation regarding distribution of display racks by a distributor as premiums or rewards to various retailers who had purchased large quantities of merchandise. The court held that under Rule 50 the transfer of the premiums to the distributor from purveyors thereof was not subject to ROTA.

Plaintiff urges in this regard that the user of an item of tangible personal property is the person who utilizes the item in furtherance of its own business welfare and that in *American Airlines*, the airline, and not the passenger who ultimately consumed the meal, was the user of the food for purposes of ROTA. As the parties stipulated, railroads are required by federal law to furnish grain doors. Installation of the doors at the expense of the shipper does not alter the fact that the railroads use the doors in direct furtherance of their business activities quite

comparable to the manner in which airlines use meals served in flight.

We next consider whether plaintiff was engaged in a retail occupation in Illinois so that it is subject to taxation under the ROTA. There is an accepted legal distinction between performance of activities which constitute a retail occupation within Illinois and mere occurrence of a sale at retail within the State. (*Automatic Voting Mach. Corp.* v. *Daley* (1951), 409 Ill. 438, 447, 100 N. E. 2d 591.) Plaintiff correctly contends that mere solicitation of sales by agents located in Illinois is not sufficient to bring a seller within the ROTA. *Ex-Cell-O Corp.* v. *McKibbin* (1943), 383 Ill. 316, 50 N. E. 2d 505.

In defining solicitation, the courts have carefully examined the authority of the soliciting agent. (*Ex-Cell-O Corp.*, 383 Ill. 316, 322.) In *Ex-Cell-O Corp.*, plaintiff's sales agents did not have authority to accept or reject orders and "acceptance or rejection was not in any respect a perfunctory matter but involved an exercise of the engineering skill of plaintiff's employees and whether it was equipped to deliver such specified machines in the form and within the time stated in the order." (383 Ill. 316, 320.) Quite to the contrary, in the case before us, the parties have stipulated that, plaintiff's home office has the authority to reject orders solicited by its agents in Illinois, "but has not done so within memory, and it is difficult to conceive of a situation where it would do so." This stipulation, combined with the fact that plaintiff employs three engineers in Illinois to familiarize users of the grain doors with methods of installation and to investigate customer complaints, leads us to conclude that plaintiff's activities in Illinois are greater than the mere solicitation contemplated by the Supreme Court in *Ex-Cell-O* and similar cases.

In determining whether plaintiff is engaged in a retail occupation in Illinois, many factors must be considered. The Supreme Court recognized this in *Ex-Cell-O* where it stated (383 Ill. 316, 321, 322):

> "An occupation, the business of which is to sell tangible personal property at retail, is the composite of many activities extending from the preparation for, and the obtaining of, orders for goods to the final consummation of the sale by the passing of title and payment of the purchase price. It is obvious that such activities are as varied as the methods which men select to carry on retail business and it is therefore not possible to prescribe by definition which of the many activities must take place in Illinois to constitute it an occupation conducted in this State. Except for a general classification that might be made of the many retail occupations, it is necessary to determine each case according to the facts which reveal the method by which the business is conducted."

In addition to the work of plaintiff's salesmen and engineers within Illinois, the grain doors are manufactured in, shipped from, and, in many instances, delivered within this State.

The Illinois Supreme Court has looked beyond the form of an allegedly interstate transaction to find that it actually constituted an intrastate sale, taxable under the ROTA. In *Marshall & Huschart Co.* v. *Rev. Dept.* (1960), 18 Ill. 2d 496, 165 N. E. 2d 305, *cert. denied* 363 U. S. 820, and *Federal-Bryant Machinery* v. *Rev. Dept.* (1968), 41 Ill. 2d 64, 241 N. E. 2d 857, the plaintiff corporations structured their sales so that they were ostensibly interstate in nature, thereby avoiding payment under ROTA in Illinois. Depending upon the actuality of the situation rather than the externalities of corporate activity, the Supreme Court held plaintiffs liable for payment of the tax.

Likewise, in the instant action, two corporations which are licensed to do business in Illinois and which manufacture products within the State, have formed a subsidiary outside of Illinois which markets their products. If the actual corporate owners of plaintiff were each to sell its products directly to the railroads they would be liable under ROTA. By acting in concert through the use of plaintiff corporation, the actual owners thereof have attempted to structure their sales and corporate activities so that ROTA is not applicable.

The stipulated facts above cited demonstrate that the greater portion of activities in connection with retail sales to railroads by plaintiff took place within Illinois. Orders from customers within the State were actively solicited by plaintiff's salesmen domiciled within Illinois. All activities in connection with the actual filling of these orders such as manufacture, shipment and in many cases delivery took place within Illinois. Plaintiff maintained an inventory of tools and accessories in Illinois. The complete domination and management of plaintiff by its corporate owners is also apparent from the record. With one exception, all officers of plaintiff are officers or employees of its corporate owners. The directors of plaintiff are appointed by these same owners. Both of these corporate owners are licensed to do business in Illinois and have plants located within the State.

It is correct, as plaintiff points out in detail, that many of its activities were carried out in locations other than the State of Illinois, including maintenance of a business headquarters, billing, collection and the keeping of records; but, the proper criterion to be applied here is not so much the quantum of activities outside of the State as it is the nature, character and significance of activities of plaintiff within the State of Illinois directly related to the business of retail selling. It follows necessarily that plaintiff is a retailer in Illinois, subject to the provisions of ROTA.

Defendant next urges that the imposition of ROTA upon plaintiff's sales of grain doors and accessories does not offend the Commerce Clause of the federal constitution. Plaintiff answers this argument by raising two contentions. First, with regard to categories 2, 3 and 4, plaintiff argues that ROT is an impermissible, unapportioned tax on gross receipts from interstate commerce. Plaintiff's second contention is that taxation of its sales in category 3 is prohibited by the Commerce Clause because these grain doors are used in interstate commerce outside of the State.

The Illinois Supreme Court has held that "when a purchaser in a sale in Illinois takes delivery of the goods in Illinois, the sale is not in interstate commerce and is taxable under State law, though the purchaser immediately takes the goods out of Illinois for use outside of Illinois." (*American Airlines* v. *Dept. of Revenue* (1974), 58 Ill. 2d 251, 259, 319 N. E. 2d 28.) As shown above, plaintiff was engaged in a retail occupation in Illinois at the time in question here, and the deliveries of the grain doors in categories 2 and 3 occurred within the State. The ROTA assessment which plaintiff has challenged does not tax its gross receipts from all sales, but only from those sales arising out of its activities as an Illinois retailer. The fact that plaintiff conducts some of its business activities outside the State does not preclude defendant from taxing these sales of grain doors and accessories in categories 2 and 3 which took place within Illinois. *Norton Co.* v. *Dept. of Revenue* (1950), 405 Ill. 314, 90 N. E. 2d 737, reversed in part, 340 U. S. 534, 95 L. Ed. 517, 71 S. Ct. 377, modified, 409 Ill. 216, 99 N. E. 2d 346.

The requirement that a local incident occur to bring a sale within the taxing power of a state (*Norton Co.* v. *Dept. of Revenue* (1951), 340 U. S. 534) was recognized by the Illinois Supreme Court in *American Airlines*. Therefore, we find that sales in category 4 are not subject to ROTA because they were delivered to the purchasing railroads outside the State of Illinois. We will discuss the application of UTA to these transactions in a later portion of this opinion.

In its argument regarding category 3, wherein grain doors and accessories were delivered to purchasing railroads within Illinois and taken outside of the State before functional use began, plaintiff urges this court to disregard an established line of cases concerning the constitutionality of ROTA as applied to sales of various commodities to railroads for use outside of Illinois. (*Pressed Steel Car Co.* v. *Lyons* (1955), 7 Ill. 2d 95, 129 N. E. 2d 765; *Superior Coal Co.* v. *Dept. of Revenue*

(1954), 4 Ill. 2d 459, 123 N. E. 2d 713 and *Moffat Coal Co.* v. *Daley* (1950), 405 Ill. 14, 89 N. E. 2d 892.) Plaintiff argues that these cases are inapplicable here because the grain doors and accessories are used by the shippers rather than by the railroads. As shown above, the fact that the shippers themselves either install the grain doors or pay the railroad for such installation does not affect our conclusion that the grain doors are used by the railroads to promote their own business welfare by enabling them to provide appropriate cars for shipping as required by federal law.

The fact that the grain doors are sold and delivered to railroads in Illinois for use out of the State does not necessarily make the sales transaction interstate so as to render application of ROTA unconstitutional. (*Moffat Coal Co.*, 405 Ill. 14, 16.) Furthermore, the Supreme Court has rejected the argument that the role of a railroad as a carrier when it carries goods consigned to itself is separate and divorced from its role as a purchaser of such goods. (*Pressed Steel Car Co.*, 7 Ill. 2d 95, 101.) We conclude that imposition of the tax by defendant on sales in category 3 is within constitutional requirements.

We next consider whether Illinois UTA applies to plaintiff's sales of grain doors and accessories in category 4 and to sales of hopper car covers in category 5. We need not reach the question of whether UTA is applicable to transactions in categories 2 and 3 because the ROTA is applicable to those sales and the parties have stipulated that "if plaintiff is held liable for the Illinois retailers' occupation or use tax on account of its 'taxable' sales of grain doors and accessories during the First [Assessment] Period it has already paid the use taxes to which the proposed assessments * * * relate." Therefore, plaintiff would in no event be liable for additional or double payments due to use tax liability for those same sales.

At all times pertinent to this litigation, the UTA included an exception for:

> "the use, in this State, of tangible personal property which is acquired outside the State and which is moved into this

> State for use as rolling stock moving in interstate commerce; * * *."

(Ill. Rev. Stat. 1965, ch. 120, par. 439.3.) In July, 1965, the legislature defined the term "acquired outside this state" as follows:

> " 'Acquired outside this State', whenever used in this Section, in addition to its usual and popular meaning, shall include the delivery, outside Illinois, of tangible personal property that is purchased in this State and delivered from a point in this State to the point of delivery outside this State."

(Ill. Rev. Stat. 1965, ch. 120, par. 439.3.) Defendant correctly concedes that this exception applies to grain doors and accessories in category 4 which were delivered to the purchasing railroads outside of Illinois, even though they might later be brought into the State for use.

Plaintiff further contends that the rolling stock exception to the statute applies to the hopper car covers delivered to railroads in Illinois from Arkansas. To support its argument, plaintiff suggests that the 1967 amendment to the UTA which deleted the requirement that the exempt items be acquired outside of the State, was intended to apply retroactively. We reject plaintiff's argument because Illinois statutes are prospective in their operation and will not be construed to be retroactive unless the statutory language is so clear that it cannot be construed otherwise. (*People* v. *Lindheimer* (1939), 371 Ill. 367, 21 N. E. 2d 318.) Plaintiff's reliance on *Johnson* v. *Marshall Field & Co.* (1972), 8 Ill. App. 3d 937, 291 N. E. 2d 310, affirmed 57 Ill. 2d 272, 312 N. E. 2d 271, in this regard is misplaced. In that case, the court considered an amendment to a taxing statute in construing the legislature's intent in enacting the original statute. However, the statutory amendment specifically stated what the legislature had intended "since the inception of" the statute in question. (See 8 Ill. App. 3d 937, 940.) The UTA contains no similar language. Therefore, we

find that the rolling stock exemption did not apply to the sales in category 5 and that plaintiff was properly assessed for use tax in connection with those sales.

We reach the following results with regard to the various categories of sales set out above. As above shown, transactions in category number 1 are not subject to ROTA or to UTA. Sales in categories 2 and 3 may be taxed under ROTA. Sales in category 4 are exempt from taxes under both ROTA and UTA. Sales in category 5 are taxable only under UTA. These guidelines should enable the trial court to determine the merits of each assessment attempted against plaintiff. The final judgment order entered July 24, 1974, is reversed and the cause is remanded with directions that further proceedings be had and additional orders be entered herein not inconsistent with the views above expressed and the conclusions reached.

REVERSED AND REMANDED
WITH DIRECTIONS.

BURKE, *J.*, and O'CONNOR, JR., *J.*, concur.

APPENDIX D.

IN THE APPELLATE COURT OF ILLINOIS
First District

PRESENT THE HONORABLE MAYER GOLDBERG *Presiding Judge.*
PRESENT THE HONORABLE JOSEPH BURKE *Judge.*
PRESENT THE HONORABLE JOHN M. O'CONNOR, JR. *Judge.*
RALPH L. SIEGEL *Clerk.* RICHARD J. ELROD *Sheriff.*

INTERNATIONAL-STANLEY CORPORATION, INC.,
Appellee-Cross-Appellant,

No. 61008 *vs.*

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, GEORGE E. MAHIN, as Director of Revenue of the State of Illinois, and ALAN J. DIXON, as Treasurer of the State of Illinois,
Appellants-Cross-Appellees.

Appeal from the Circuit Court of Cook County.

(No. 64-CH-6562)

REVERSING AND REMANDING ORDER

The judgment order entered July 24, 1974 of the Circuit Court of Cook County is REVERSED and this case is remanded with directions that further proceedings be had and additional orders be entered herein not inconsistent with the views expressed and the conclusions reached in the opinion of this Court this day filed herein.

July 6th, 1976

CERTIFICATE

I certify that this is a copy of the order of the Appellate Court, First District.

February 18th, 1977

/s/ GILBERT S. MARCHMAN
Clerk of Court

(SEAL)

APPENDIX E.

No. 48800

IN THE SUPREME COURT OF ILLINOIS

INTERNATIONAL-STANLEY CORPORATION,
a Nebraska corporation,
Plaintiff-Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, GEORGE E. MAHIN, as Director of Revenue of the State of Illinois, and ALAN J. DIXON, as Treasurer of the State of Illinois,
Defendants-Respondents.

Petition for Leave to Appeal
from the
Appellate Court of Illinois, First District,
No. 61008

PETITION FOR LEAVE TO APPEAL

August 30, 1976

PETITION FOR LEAVE TO APPEAL FROM THE JUDGMENT OF THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

To the Honorable Justices of the Supreme Court of Illinois:

Petitioner, International-Stanley Corporation, by its attorney, Paul A. Teschner, respectfully represents and shows as follows:

1. On July 6, 1976, the Appellate Court of Illinois, First District, rendered and entered its judgment reversing a certain judgment entered in the Circuit Court of Cook County, Illinois, on July 24, 1974, in favor of International-Stanley Corporation and against Defendants-Respondents.

2. Said judgment of the Appellate Court became final on July 27, 1976, upon expiration of the time within which a petition for rehearing might have been filed. No petition for rehearing was filed in the Appellate Court.

3. The points relied upon for reversal of the judgment of the Appellate Court are the following:

3.1 The Appellate Court erred in holding that International-Stanley Corporation was engaged in a "retail occupation" within the state of Illinois, hence was liable to pay retailers occupation taxes.

3.2 The Appellate Court erred in holding that the grain doors were not "resold," within the meaning and intent of the Illinois Retailers Occupation Tax Act ["ROTA"], by the railroad customers of International-Stanley Corporation to the shippers of grain products or to grain elevator operators.

3.3 The Appellate Court erred in holding that the railroad customers of International-Stanley Corporation "used" the grain doors within the meaning and intent of the Illinois ROTA.

3.4 The Appellate Court erred in holding that imposition of the Illinois Retailers Occupation Tax did not constitute

an impermissible burden upon interstate commerce contrary to the Commerce Clause, Article I, § 8, of the Constitution of the United States.

3.5 The Appellate Court erred in holding that the Illinois Retailers Occupation Tax; as applied in this case, was not an impermissible, unapportioned tax on gross receipts arising from interstate commerce contrary to the Commerce Clause of the Constitution of the United States.

4. The facts relevant to an appeal have been substantially correctly stated by the Appellate Court with the following exceptions:

4.1 The Appellate Court has incorrectly stated the facts with respect to the functions performed by grain doors. At its Opinion, p. 2, the Appellate Court has stated:

"Grain doors are corrugated paper panels which are nailed across the inside of railroad boxcar doorways or used to line weakened inside walls of railroad freight cars."

Because almost all of the tax at issue in this case is attributable to Plaintiff-Petitioner's sales of "grain doors," and only an insignificant portion is concerned with Plaintiff-Petitioner's sales of "paper car liners," it is essential that there be no confusion between the two products. The record is clear as to the distinction [Record, C114]:

> "(a) Corrugated paper grain doors and corrugated paper barricades * * * are nailed across the inside of railroad boxcar doorways, and are used in conjunction with shipments by rail of bulk (loose, unpackaged) materials including grain, sand, fertilizer, salt, potash and sawdust;
>
> * * *
>
> "(c) Corrugated paper car liners * * * are used to line damaged or weakened inside walls of railroad freight cars; * * *"

The grain doors may not be used, alternatively, either to enclose and protect grain shipments or to effectuate the duty of

a railroad to line damaged or weakened inside walls so as to provide a secure and safe car. Grain doors are susceptible of use only for the purpose of enclosing loose and unpackaged, bulk materials shipped in railroad boxcars and there is nothing in the record to justify a contrary conclusion.

4.2 At page 3 of its opinion, the Appellate Court asserts:

> "Plaintiff is a Nebraska corporation owned equally by International Paper Company, a New York corporation, and The Stanley Works, a Connecticut corporation, both of which are licensed to do business in Illinois. The grain doors are manufactured by International Paper at its plant in Illinois. The hopper car covers are manufactured at its plant in Arkansas. The accessories and tools are manufactured by Stanley Works at its Illinois plant. Upon completion of tools and accessories they are shipped to the International Paper plant in Illinois for storage pending further shipment. While thus in storage in Illinois, these items are included in Plaintiff's inventory."

These facts have been incorrectly stated by the Appellate Court in two respects, *to wit:*

4.2.1 The only plant which The Stanley Works has in Illinois is a warehouse and it manufactures nothing in Illinois. The only portion of the record which refers to the manufacture of accessories and tools is at Record C115 which reads:

> "The accessories and tools which are used in connection with the installation of the grain doors are manufactured by Stanley Works and State Steel Products. Plaintiff has a blanket purchase order on file with both manufacturers which authorizes them to manufacture and ship accessories and tools to International Paper's plant in Northlake upon request of International Paper."

There is nothing in the Record to support the Appellate Court's assertion that the manufacture of the tools and accessories by The Stanley Works takes place in Illinois.

4.2.2 Although it is correct that the tools and accessories are included in the inventory of International-Stanley, there

is nothing in the record to support the assertion that the grain doors are likewise so included. Indeed, the record is directly to the contrary on the point [Record C115-116]:

> "6.2 None of the grain doors are ever included in Plaintiff's inventory before they leave the respective International Paper plant at which they are manufactured.
>
> * * *
>
> "6.6 The accessories and/or tools are stored at International Paper's Northlake plant pending reshipment along with a shipment of grain doors. The accessories and tools are included in Plaintiff's inventory when they are so stored."

4.3 The Appellate Court has incorrectly stated the facts with respect to shipment and "delivery" of the grain doors. At its Opinion, p. 4, the Appellate Court asserts in part:

> "3). The railroad takes delivery of the grain doors in Illinois but transports them out of the State where functional use will then begin."

There is nothing in the record to support such an interpretation of the facts with respect to 62% of the transactions at issue in this case; indeed, the record carefully avoids using "delivery," which is a legal conclusion [Record C119-120]:

> "(c) Sometimes the shipment destination point of the grain doors and accessories is at a point outside of Illinois, where the functional use of the grain doors and accessories will commence; however, the purchasing railroad first comes into contact with the grain doors and accessories at a point inside of Illinois from which point it transports them to the out-of-state shipment destination point. Example: Grain doors and accessories are sold to A railroad to be delivered in Des Moines, Iowa. B railroad transports a freight car loaded with the grain doors and accessories to a junction point within Illinois where the freight car is unhooked and attached to an A railroad freight train bound for Des Moines."

By stating as a fact that the railroad takes "delivery" of the grain doors in Illinois, notwithstanding that they are loaded

as cargo [and not as fuel in an airplane's fuel tanks or as food in an airplane's food compartment] which is destined from the time of submission of an order to be delivered outside of Illinois, the Appellate Court has incorrectly stated a fact of overriding importance to the correct resolution of this case.

4.4 The Appellate Court has incorrectly stated the facts relating to the question of the services performed by the railroad customers of the Petitioner. At page 7 of its Opinion, the Appellate Court has asserted:

"* * * The railroads which purchase grain doors from plaintiff are essentially selling shipping services regarding which acquisition and disposition of the grain doors is merely incidental."

This is an incorrect statement of facts with nothing in the record in this case to support it. Indeed, it is directly contrary to the fact that railroads are prohibited from engaging in the shipment of commodities by Section 1(8) of the Interstate Commerce Act, 49 *U. S. C. § (1)(8)* which provides:

"It shall be unlawful for any railroad company to transport * * * any article or commodity * * * manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interests, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The purpose of that provision is "to prevent railroads from occupying the dual and inconsistent positions of public carrier and private shipper." *United States* v. *Delaware, Lackawanna & Western R. R. Company,* 238 U. S. 516, 525.

4.5 The fifth principal factual assertions which have been incorrectly stated by the Appellate Court are found on page 10 of its Opinion which reads as follows [Opinion p. 10]:

"Likewise, in the instant action, two corporations which are licensed to do business in Illinois and which manufacture products within the state, have formed a subsidiary outside of Illinois which markets their products. If the actual corporate owners of plaintiff were each to sell its products directly to the railroads they would be liable under ROTA. By acting in concert through the use of plaintiff corporation, the actual owners thereof have attempted to structure their sales and corporate activities so that ROTA is not applicable."

As indicated above, The Stanley Works does not manufacture within Illinois any products at all but only has a warehouse in Illinois. Of more concern, however, is the Appellate Court's assertion that any sales directly to the railroads by International Paper Company or The Stanley Works would subject those corporations to ROT liability. Whether or not that assertion is true is not in issue in this case and certainly should not properly be advanced as a reason for reversing the decision of the trial court and deciding the appeal in favor of the Department of Revenue.

5. Review by the Supreme Court of Illinois of this case is warranted, and the decision of the Appellate Court should be reversed, for the following reasons.

First Question Presented

There is a direct conflict between the decision of the Appellate Court in this case and the decision of this Court in the case of *Automatic Voting Machine Corporation* v. *Daley,* 409 Ill. 438. The issue in the *Automatic Voting Machine* case, like the first question presented here, was whether the taxpayer, a manufacturer of voting machines, was engaged in an Illinois retail occupation. In that case, the taxpayer engaged in an impressive number of activities within Illinois [409 Ill. 438 at 443]:

"[Taxpayer] had engaged for many years in promoting sales in Illinois and * * * the contracts for the sale of the machines were formed in Illinois. * * * [Taxpayer] was in

> Illinois every time it submitted a bid, title to the machines passed in Illinois, the contracts were enforceable in Illinois and subsidiary [maintenance] services required were performed in Illinois."

This Court, reversing a decision of the Circuit Court of Cook County, held that Automatic Voting Machine Corporation was not engaged in a retail occupation within Illinois, hence was not subject to the ROTA [409 Ill. 438 at 451, 452]:

> "* * * [The] Act does not apply to the transaction under our consideration. * * * [The] Illinois activity consisted only of promotional work, delivery of bids, transfer of title, delivery of machines and servicing. These factors, coupled with the use of the articles sold and the foregoing analogy, are insufficient to justify the application of the Act * * *."
>
> "We cannot but feel that to extend this act to cover the situation before us would be to distort its meaning and would lead to a disastrous result. * * * We do not feel that our act intended such a result. * * *"

An attempt by the Illinois legislature to extend the operation of the ROTA to "selling activity in this State" was held to be unconstitutional in the cases of *Allis-Chalmers Manufacturing Company* v. *Stratton*, Circuit Court of Sangamon County, Chancery No. 85551 (1944) and *Ex-Cell-O Corporation* v. *Collins*, Circuit Court of Sangamon County, No. 85559 (1944).

Second Question Presented.

The Appellate Court's holding that the grain doors were not "resold" by the railroads to the shippers, within the meaning and intent of the Illinois ROTA, is in direct conflict with the decision of this Court in the case of *Belleville Dr. Pepper* v. *Korshak*, 36 Ill. 2d 352. That case held that bottles which contained beverages which were sold by customers of the taxpayer were themselves "resold" by the taxpayer's customers to the ultimate consumers. This Court held that there were "resales" of the bottles to the beverage purchasers, within the meaning and intent of the Illinois

ROTA, even though the purchasers were required to give a deposit and had an absolute right to return those bottles to the seller. Since the railroads surrender possession of the single-use grain doors to the shippers and also surrender all right to reclaim the possession of them, they have been "resold" under the test established in the *Belleville Dr. Pepper* case. *See* 36 Ill. 2d 352 at 355.

The Appellate Court's decision that there were no "resales" of the grain doors by the railroads also conflicts with the decision of this Court in *Boye Needle Co.* v. *Department of Revenue*, 45 Ill. 2d 484. There this Court held that display racks distributed by a manufacturer of knitting and sewing accessories to its retail customers, without additional cost, were "resold" within the meaning and intent of the Illinois Use Tax Act. The Appellate Court limited application of the *Boye Needle* case to situations in which the item distributed by a taxpayer without additional cost may be classified as "premiums or rewards." *See*, Opinion pp. 7-8. There is nothing in this Court's opinion in the *Boye Needle* case, however, which would support such a limitation upon the holding in that case.

Petitioner respectfully suggests to the Court that the question of the purview of "resale" presented is of general importance. The need for clarification and resolution of that question is disclosed, in part, by the Appellate Court's reliance upon the case of *American Airlines, Inc.* v. *Department of Revenue*, 58 Ill. 2d 251. The Appellate Court regarded that case as constituting precedent upon the question of whether or not the grain doors were "resold" by Petitioner's railroad customers. Aside from the factual differences, however, that case was decided in a much different context from this one. There this Court upheld the validity of a particular rule of the Illinois Department of Revenue which provided specifically that meals loaded into interstate aircraft in Illinois would be subject to tax as the airlines do not "resell" those meals to the aircraft passengers. In this case there is no similar rule; indeed, the specific provisions of Rule 50 are quite to the contrary:

> "Persons who sell tangible personal property [International-Stanley] to purchasers [the railroads] who transfer such property [the grain doors] to others along with * * * service for which a charge is made are selling tangible personal property to purchasers for purposes of resale and are not liable for retailers occupation tax when making such sales."

Third Question Presented

A separate and distinct question presented is whether or not the grain doors were "used" by the railroads themselves or by the shippers. "Two elements must be present before there is a taxable sale. First, there must be a sale for use and consumption, and second, the item sold is not for resale." ***Belleville Dr. Pepper*** v. ***Korshak***, 36 Ill. 2d 352, 354.

It is respectfully suggested to the Court that the question presented is of general importance; unfortunately there is not much authority with respect to it as evidenced, in part, by the inability of the Appellate Court to cite authority to sustain its following holding [Opinion p. 8]:

> "* * * Installation of the doors at the expense of the shipper does not alter the fact that the railroads used the doors in direct furtherance of their business activities quite comparable to the manner in which airlines use meals served in flight."

The Appellate Court did not discuss the fact that not all airline passengers consume meals and that any unconsumed meals are available to the airlines for use to serve other passengers. Certainly that is one important distinction from the situation involving the grain doors because every shipper of grain, in pursuing his own business interests, must use the grain doors to enclose the grain shipments.

The Appellate Court, in holding that the railroads used the grain doors, relied upon the three cases of ***Moffat Coal Co.*** v. ***Daley***, 405 Ill. 14, ***Superior Coal Co.*** v. ***Department of Revenue***, 4 Ill. 2d 453, and ***Pressed Steel Car Co., Inc.*** v. ***Lyons***, 7 Ill. 2d 95. All of those cases, however, involved sales of items which were to be functionally used by the railroads in their own businesses. The coal sold in the *Moffat* and *Superior Coal* cases and the railroad supplies purchased in the *Pressed Steel Car* case all were essential to the business operations of the railroad purchasers. All of those items were purchased for consumption by the railroads themselves rather than for use by shippers in their businesses of preparing grain or other commodities for subsequent carriage.

Fourth Question Presented

The Appellate Court held that there was no violation of the Commerce Clause because the grain doors were "delivered" in Illinois to the railroads [albeit there was nothing in the record to sustain that conclusion] and regarded the local incident of such "delivery" as sufficient to immunize the Illinois tax from a violation of the Commerce Clause.

The Appellate Court, in holding the tax to be constitutional under the Commerce Clause, relied upon the case of ***Pressed Steel Car Co., Inc.*** v. ***Lyons***, 7 Ill. 2d 95. But the ***Pressed Steel Car*** case had relied primarily on ***Superior Oil Company*** v. ***Mississippi***, 280 U. S. 390, a case which has no application whatever to this one. There gasoline had been sold by a Mississippi company to Mississippi shrimp packers and delivered to them within Mississippi at which time the purchasing packers could do as they liked with the gasoline. The packers then carried the gasoline to Louisiana. In what was a transparent attempt to avoid Mississippi taxes by elevating form over substance, the packing company would turn over to the selling oil company a so-called "bill of lading" which purported to show that the gasoline was to be transported by the packing company to a point outside of Mississippi. A Louisiana "neighborhood" rather than any specific point was named as destination for alleged redelivery of the gasoline there into the tanks of fishing boats. Mr. Justice Holmes, writing for the Court, recognized

the decisive fact as being the clear attempt of the purchaser to convert an intrastate purchase into an interstate transaction [280 U. S. 390, 394-395, 396]:

> "* * * The document seems to have had no other use than, as the Supreme Court of Mississippi said, to try to convert a domestic transaction into one of interstate commerce. There was no consignee at the point of destination. The goods were delivered to the so-called consignee before they started, and were in its hands throughout. There was no point of destination for delivering of the oil but merely a neighborhood in which the packers that had bought it and already held it expected to sell it again. The document hardly can affect the case, because it is 'not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause' * * * at least when the contract achieves nothing else.
>
> "* * * We may admit that this case is near the line. * * * But here the gasoline was in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes. If it had bought bait for fishing that it intended to do itself, the purchase would not have been interstate commerce because the fishing grounds were known by both parties to be beyond the State line. A distinction has been taken between sales made with a view to a certain result and those made simply with indifferent knowledge that the buyer contemplates that result. * * * The only purpose of the vendor here was to escape taxation. * * * It is a matter of proximity and degree as to which minds will differ, but it seems to us that the connection of the seller with the steps taken by the buyer after the sale was too remote to save the seller from the tax. Dramatic circumstances such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here."

The *Pressed Steel Car* case did not advert to the question of whether or not the tax considered there was violative of the Commerce Clause. It is unfortunate that the Appellate Court did not discuss the question for it seems clear that imposition of the tax measured by Petitioner's sales of the grain doors, which were from the beginning destined for out-of-Illinois locations and were in fact transported to such locations—constitutes a clear violation of the many "stream-of-commerce" cases decided by the Supreme Court of the United States. The trial court, Judge Sarnow presiding, did indeed hold that the Commerce Clause precluded the assessment of such a tax.

Some of the principal cases on the point would include *Michigan-Wisconsin Pipeline Company* v. *Calvert*, 347 U. S. 157, 166-167; *Joseph* v. *Carter & Weekes Stevedoring Company*, 330 U. S. 422, 427-428, 429, 433; *Richfield Oil Corporation* v. *State Board of Equalization*, 329 U. S. 69, 82-83; *Santa Cruz Packing Company* v. *NLRB*, 303 U. S. 453, 467; *Hughes Brothers Timber Company* v. *Minnesota*, 272 U. S. 469, 476; *Peoples Natural Gas Company* v. *Public Service Commission*, 270 U. S. 550, 554; *Shafer* v. *Farmers Grain Company*, 268 U. S. 189, 198; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 309; *Stafford* v. *Wallace*, 258 U. S. 495, 516, 518-519; *Lemke* v. *Farmers Grain Company*, 258 U. S. 50, 54-55, 58-59; *Dahnke-Walker Milling Company* v. *Bondurant*, 257 U. S. 282, 290, 292; *United Fuel Gas Company* v. *Hallanan*, 257 U. S. 277, 281; *Western Union Telegraph Company* v. *Foster*, 247 U. S. 105, 113; *York Manufacturing Company* v. *Colley*, 247 U. S. 21, 26; *Heyman* v. *Hays*, 236 U. S. 178, 187; *The Pipeline Cases*, 234 U. S. 548, 560; *Texas & New Orleans R. R. Co.* v. *Sabine Tram Company*, 227 U. S. 111, 126; *Rearick* v. *Pennsylvania*, 203 U. S. 507, 512; *Swift & Company* v. *United States*, 196 U. S. 375, 398; and *American Express Company* v. *Iowa*, 196 U. S. 133, 143.

By their emphasis upon "delivery" within Illinois, Respondents seek to isolate the incidents of loading as being deter-

minative in the assessment of a tax: (1) if grain doors are loaded onto a carrier other than the purchasing railroad, which will carry them in a continuous journey to an out-of-Illinois destination, then there will be no tax; but (2) if grain doors are loaded either onto cars of a purchasing railroad or onto cars which will be turned over to a purchasing railroad within Illinois, then a tax is properly assessed even though the grain doors are transported—as originally intended—to shipment destination points outside of Illinois. The principal cases just cited leave no doubt of the constitutional invalidity under the Commerce Clause of such a theory.

The rule which Respondents would establish does, admittedly, have the virtue of simplicity. They argue that whenever a railroad purchases an item intended to be transported outside of Illinois which is then turned over to it as carrier within Illinois, the tax is on the local incident of "delivery" rather than on interstate commerce itself. But simplicity has never been the touchstone of inquiries into whether or not the stream of interstate commerce is flowing in a particular case. Such inquiries must be decided by a gradual process of inclusion and exclusion in each particular case.

Fifth Question Presented

The Appellate Court has correctly recognized that many of the alleged retail occupation activities of International-Stanley do take place outside the State of Illinois. Opinion p. 11. Having recognized that fact, however, the Appellate Court then has confused the question by analyzing the tax as if it were a sales tax rather than an occupation tax upon gross receipts of a retailer [Opinion, p. 11]:

> "* * * The ROTA assessment which plaintiff has challenged does not tax his gross receipts from all sales, but only from those sales arising out of activities as an Illinois retailer. The fact that plaintiff conducts some of its business activities outside the state does not preclude defendant

> from taxing these sales of grain doors * * * which took place within Illinois.* * * "

Because the occupation of International-Stanley was multistate, the question is squarely presented whether the Illinois ROTA, as applied here, violates the well-established rule that unapportioned gross receipt taxes are unconstitutional when imposed by the state from which the goods are sent.

The Appellate Court erred in failing to hold that the Commerce Clause forbids imposition of an Illinois ROT on Petitioner because that would tax Petitioner's gross receipts from interstate commerce without apportionment between the fraction of Petitioner's occupation conducted within Illinois and the part which takes place outside of Illinois only. *Evco* v. *Jones*, 409 U. S. 91; *J. D. Adams Manufacturing Company* v. *Storen*, 304 U. S. 307, 311; *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 438; and *Freeman* v. *Hewit*, 329 U. S. 249.

6. The opinion of the Appellate Court in this case is attached hereto marked "Exhibit A," and made a part hereof.

WHEREFORE, Petitioner prays for leave to appeal to this Court from the aforementioned judgment of the Appellate Court of Illinois, First District.

Dated: August 30, 1976

/s/ PAUL A. TESCHNER
Paul A. Teschner

PAUL A. TESCHNER
39 South LaSalle Street
Chicago, Illinois 60603
(312) 332-0346

APPENDIX F.

UNITED STATES OF AMERICA

STATE OF ILLINOIS } ss.
SUPREME COURT }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of November in the year of our Lord, one thousand nine hundred and seventy-six, within and for the State of Illinois.

PRESENT: DANIEL P. WARD, *Chief Justice*
JUSTICE WALTER V. SCHAEFER
JUSTICE THOMAS E. KLUCZYNSKI
JUSTICE HOWARD C. RYAN
JUSTICE ROBERT C. UNDERWOOD
JUSTICE JOSEPH H. GOLDENHERSH
JUSTICE CASWELL J. CREBS
WILLIAM J. SCOTT, *Attorney General*
LOUIE F. DEAN, *Marshal*
ATTEST: CLELL L. WOODS, *Clerk*

Be It Remembered, that, to-wit: on the 3rd day of December 1976, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

INTERNATIONAL-STANLEY CORPORATION, a Nebraska corporation, *Petitioner,*	
No. 48800 *vs.*	Petition for Leave to Appeal from Appellate Court First District.
DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, GEORGE E. MAHIN, as Director of Revenue of the State of Illinois, and ALAN J. DIXON, as Treasurer of the State of Illinois, *Respondents.*	61008 64 CH 6562

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 7th day of February, 1977.

/s/ CLELL L. WOODS
Clerk, Supreme Court of the State of Illinois.

(SEAL)

APPENDIX G.

No. 61008

IN THE APPELLATE COURT OF ILLINOIS
First District

INTERNATIONAL - STANLEY CORPORATION, A NEBRASKA corporation, *Plaintiff-Appellee, Cross Appellant,* *vs.* DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, GEORGE E. MAHIN, as Director of Revenue of the State of Illinois, and ALAN J. DIXON, as Treasurer of the State of Illinois, *Defendants-Appellants, Cross Appellees.*	Appeal From The Circuit Court of Cook County, Illinois, County Department, Chancery Division. — Honorable Raymond S. Sarnow, Judge Presiding.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES
AND
PROOF OF SERVICE.

(Filed Appellate Court Jan. 21, 1977, Ralph I. Siegel, Acting Clerk.)

Notice is hereby given that International-Stanley Corporation, the Plaintiff-Appellee, Cross Appellant above named, hereby appeals to the Supreme Court of the United States from the judgment of the Appellate Court of Illinois, entered in this action on the 6th day of July, 1976, which reversed a final judgment which had been entered by the Circuit Court of Cook

County on the 24th day of July, 1974, in favor of International-Stanley Corporation. On December 3, 1976, the Supreme Court of Illinois denied International-Stanley Corporation's Petition For Leave To Appeal and on January 3, 1977, the mandate of the Appellate Court issued to the Circuit Court of Cook County.

This appeal is taken pursuant to 28 U. S. C. Section 1257(2).

/s/ PAUL A. TESCHNER,
Paul A. Teschner,
39 South LaSalle Street,
Chicago, Illinois 60603,
(312) 332-0346,
Attorney For Plaintiff-Appellee, Cross Appellant.

CERTIFICATE OF SERVICE.

I, PAUL A. TESCHNER, attorney of record for International-Stanley Corporation, Plainitff-Appellee, Cross Appellant herein, certify that on the 21st day of January, 1977, I served a copy of the foregoing Notice of Appeal To The Supreme Court Of The United States upon WILLIAM J. SCOTT, Attorney General of the State of Illinois, attorney for Defendants-Appellants, Cross Appellees herein, by depositing a copy of said Notice of Appeal in a United States Mail Box, with first class postage fully prepaid, enclosed in a sealed envelope plainly addressed to said attorney at Suite 900, 160 North LaSalle Street, Chicago, Illinois 60601.

/s/ PAUL A. TESCHNER,
Paul A. Teschner,
39 South LaSalle Street,
Chicago, Illinois 60603,
(312) 332-0346,
Attorney For Plaintiff-Appellee,
Cross Appellant.

I, Gilbert S. Marchman, Clerk of the Appellate Court, in and for the First District of the State of Illinois, and keeper of the records, files and seal thereof, DO HEREBY CERTIFY, That the foregoing is a true copy of a Notice of Appeal to the Supreme Court of the United States, Proof of Service and Certificate of Service entered in said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of the said Appellate Court, at Chicago, this 18th day of February in the year of our Lord one thousand nine hundred and Seventy-Seven.

/s/ GILBERT S. MARCHMAN,
Clerk of the Appellate Court
of the First District, Illinois.

(SEAL)

APPENDIX H.

STATUTORY AND ARTICLE PROVISIONS INVOLVED.

Retailers' Occupation Tax Act (Ill. Rev. Stat., C. 120, §§ 440-453). *Sec. 2* (Ill. Rev. Stat., C. 120, § 441):

"A tax is imposed upon persons engaged in the business of selling tangible personal property at retail at the rate of * * *% of the gross receipts from such sales of tangible personal property made in the course of such business * * *."

Sec. 1 (Ill. Rev. Stat., C. 120, § 440):

* * *

"Gross receipts, from the sales of tangible personal property at retail means the total selling price or the amount such sales * * *."

Article No. 3 [Administrative Regulation]

GROSS RECEIPTS.

"1. Meaning of 'Gross Receipts'

"'Gross receipts' means all the consideration actually received by the seller, except traded-in tangible personal property.

* * *

"3. Cost of Doing Business Not Deductible

"In computing retailers' occupation tax liability, no deductions shall be made by a taxpayer from gross receipts or selling prices on account of the cost of property sold, the cost of materials used, labor or service costs, freight or transportation costs, overhead costs, clerk hire or salesmen's commissions, interest paid by the seller, or any other expenses whatsoever."

APPENDIX I.

CONSTITUTIONAL PROVISIONS INVOLVED.

Constitution of the United States

Article I, § 8.

Congress shall have power * * * To regulate commerce * * * among the several States.

Supreme Court, U. S.
FILED
MAY 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1202

INTERNATIONAL-STANLEY CORPORATION,
a Nebraska Corporation,

Appellant,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,
GEORGE E. MAHIN as Director of Revenue
of the State of Illinois, and
ALAN J. DIXON as Treasurer of the State of Illinois,

Appellees.

On Appeal From The Appellate Court
Of Illinois, First District

MOTION TO DISMISS OR AFFIRM

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IN THE

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INTERNATIONAL-STANLEY CORPORATION,
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Appellant,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,
GEORGE E. MAHIN as Director of Revenue
of the State of Illinois, and
ALAN J. DIXON as Treasurer of the State of Illinois,

Appellees.

On Appeal From The Appellate Court
Of Illinois, First District

MOTION TO DISMISS AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondents, Department of Revenue of the State of Illinois, *et al.*, respectfully pray that this Court dismiss the appeal sought from the decision of the Illinois Appellate Court entered July 6, 1976. Respondents further pray that a Writ of Certiorari to the Appellate Court of Illinois be denied.

OPINION BELOW

The opinion of the Illinois Appellate Court, First District is reported at 40 Ill.App.3d 397, 352 N.E.2d 272 (1976). The opinion is included herein as Appendix A.

JURISDICTION

Jurisdiction is predicated upon 28 U.S.C. §§ 1257(2) and 2101(c).

QUESTIONS PRESENTED

1. Whether a state may validly tax a local sale of goods to be used or consumed in interstate commerce.

2. Whether the Illinois Retailers' Occupation Tax Act imposes an unapportioned gross receipts tax.

STATUTE INVOLVED

Pertinent provisions of the Illinois Retailers' Occupation Tax Act, Ill.Rev.Stat., 1973, ch. 120, are reprinted herein as Appendix B.

STATEMENT OF THE CASE

Plaintiff is a Nebraska corporation which is owned equally by International Paper Company and Stanley Works, both of which are licensed to do business in the State of Illinois. The grain doors are manufactured by International Paper at its plant in Illinois and the accessories and tools are manufactured by Stanley Works at its Illinois plant.

Plaintiff employs three salesmen and three engineers who work almost exclusively in the State of Illinois. The salesmen generate and solicit orders. The engineers familiarize users of the grain doors with installation and investigate complaints. All orders are accepted at plaintiff's out-of-state offices, although the parties stipulated that no order has been rejected within memory and it is difficult to conceive of a situation in which an order would be rejected.

The Illinois Appellate Court, First District, held that, despite plaintiff's corporate structure, its sales of grain doors were local sales and, where the purchasing railroads took delivery inside the state of Illinois, the sales were subject to retailers' occupation tax. Plaintiff has appealed from this determination.

ARGUMENT

I.

THE IMPOSITION OF ILLINOIS RETAILERS' OCCUPATION TAX ON THE SALES OF GRAIN DOORS INVOLVED IN THIS CASE DOES NOT BURDEN INTERSTATE COMMERCE.

Contrary to the arguments advanced by plaintiff in the instant case, the holding of the Illinois Appellate Court was not "that a tax may be assessed because the grain doors were 'delivered' within Illinois . . .", but rather the Court held that the plaintiff was subject to Illinois retailers' occupation tax because it was engaged in the business of selling tangible personal property at retail within the State of Illinois. Although plaintiff had organized its corporate structure to ensure that the technical acceptance of all orders occurred out-of-state, the Illinois Appellate Court held that taxability was dependent "upon the actuality of the situation", rather than the "externalities of corporate activity". Reviewing the facts of this case the Court held,

> Likewise, in the instant action, two corporations which are licensed to do business in Illinois and which manufacture products within the State, have formed a subsidiary outside of Illinois which markets their products. If the actual corporate owners of plaintiff were each to sell its products directly to the railroads they would be liable under ROTA. By acting in concert through the use of plaintiff corporation, the actual owners thereof have attempted to structure their sales and corporate activities so that ROTA is not applicable.
>
> The stipulated facts above cited demonstrate that the greater portion of activities in connection with retail sales to railroads by plaintiff took place within Illinois. Orders from customers within the State were actively solicited by plaintiff's salesmen

> domiciled within Illinois. All activities in connection with the actual filling of these orders such as manufacture, shipment and in many cases delivery took place within Illinois. Plaintiff maintained an inventory of tools and accessories in Illinois. The complete domination and management of plaintiff by its corporate owners is also apparent from the record. With one exception, all officers of plaintiff are officers or employees of its corporate owners. The directors of plaintiff are appointed by these same owners. Both of these corporate owners are licensed to do business in Illinois and have plants located within the State.
>
> It is correct, as plaintiff points out in detail, that many of its activities were carried out in locations other than the State of Illinois, including maintenance of a business headquarters, billing, collection and the keeping of records; but, the proper criterion to be applied here is not so much the quantum of activities outside of the State as it is the nature, character and significance of activities of plaintiff within the State of Illinois directly related to the business of retail selling. It follows necessarily that plaintiff is a retailer in Illinois, subject to the provisions of ROTA.

This holding is predicated upon the well-settled rule that the State has the right to stop behind a transaction which has been contrived by a taxpayer for purposes of tax evasion. *Marshall & Huschart Machinery Co. v. Department of Revenue*, 18 Ill.2d 496, 165 N.E.2d 305, *cert. den.* 363 U.S. 820 (1960); *Federal Bryant Machinery Co. v. Department of Revenue*, 41 Ill.2d 64, 241 N.E.2d 957 (1968); *Abt v. Department of Revenue*, 34 Ill.2d 324, 215 N.E.2d 243 (1966).

It should be noted that while transactions are not invalid merely because they are undertaken for the purpose of minimizing or avoiding taxes, unless there is a

valid business purpose other than tax avoidance, a transaction will not be recognized as valid and will be found to be taxable. When the object of the transaction is to act as a mere device for a preconceived result of tax avoidance, such a transaction will be recognized as a sham. *Gregory v. Helvering*, 283 U.S. 465 (1935); *Higgins v. Smith*, 308 U.S. 473 (1940); *Bazley v. Commissioner*, 331 U.S. 737 (1947); *Goodstein v. Commissioner*, 267 F.2d 127 (1st Cir. 1959). In the instant case, the Court found that the corporate structure of plaintiff was organized for the purpose of tax avoidance and, therefore, it held that plaintiff was engaged in the business of selling at retail within the State of Illinois and was subject to Illinois retailers' occupation tax.

It cannot be disputed that interstate commerce is not absolutely immune from state taxation. Interstate commerce can be required to pay a nondiscriminatory share of the State tax burden. *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 35 L.Ed.2d 545 (1973). In determining whether a state tax imposes an impermissible burden on interstate commerce, the issue is whether the local activity which is made the subject of the tax is such an integral part of the interstate process—the flow of commerce—that it cannot really be separated from it. *Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537, 540, 21 L.Ed.2d 759 (1969). A tax on local sales has never been held to be such an "integral" part of commerce.

Since the Appellate Court held that plaintiff was engaged in the business of selling at retail in Illinois, and since the purchasing railroads took delivery of the goods (grain doors) inside the State, the sale was not made in interstate commerce. The Illinois Supreme Court has held:

> It is clear that when a purchaser in a sale in Illinois takes delivery of the goods in Illinois the sale is not in interstate commerce and is taxable under State law, though the purchaser immediately takes the goods out of Illinois (citations omitted). *American Airlines, Inc. v. Department of Revenue*, 58 Ill.2d 251, 319 N.E.2d 28 (1974).

This Court has frequently held that the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a nondiscriminatory tax imposed by the State. *Eastern Air Transport, Inc. v. South Carolina Tax Comm.*, 285 U.S. 147, 76 L.Ed. 673, 675 (1932); *State Tax Commission of Utah v. Pacific States Cast Iron Pipe Co.*, 372 U.S. 605, 10 L.Ed.2d 8 (1963); *International Harvester Co. v. Dept. of Treasury of Indiana*, 322 U.S. 340, 88 L.Ed. 1313 (1944). Since the sales in question in the instant case were not made in interstate commerce, they were properly taxable by the State of Illinois, despite the fact that the goods were immediately taken from the State and used in interstate commerce. Such a tax is not a direct tax on interstate commerce.

Furthermore, this Court has frequently upheld taxes which were direct taxes upon interstate commerce when the tax was applied to an activity which had a substantial nexus with the taxing state, was fairly apportioned, did not discriminate against interstate commerce and was fairly related to the services provided by the taxing state. *General Motors Corp. v. Washington*, 377 U.S. 436, 12 L.Ed.2d 430 (1964); *Standard Pressed Steel Co. v. Department of Revenue*, 419 U.S. 560 (1975); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444, 85 L.Ed. 267 (1940).

Historically, there was a blanket prohibition against any state taxation imposed directly on an interstate transaction. Therefore, a direct tax on interstate sales, even if fairly apportioned and nondiscriminatory, was held to be unconstitutional *per se. Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951). However, this rule was specifically overturned in the recent decision in *Complete Auto Transit, Inc. v. Brady*, 45 L.W. 4259, 4263 (1977). Therefore, it is clear that a state may validly impose a tax on the privilege of carrying on an interstate business, so long as the tax is fairly apportioned and nondiscriminatory in nature. Consequently, a much stronger case for local taxation is made where, as here, the sales have been found to be local sales, even though technical acceptance of the orders was made by the out-of-state corporation. Under such circumstances, the local tax is valid unless it directly burdens interstate commerce. The taxpayer in the instant case has not contended that the Illinois tax discriminates against individuals engaged in interstate commerce. Therefore, the tax can validly be imposed.

II.

THE ILLINOIS RETAILERS' OCCUPATION TAX IMPOSED UPON PLAINTIFF WAS PROPERLY APPORTIONED.

Taxpayer's final contention, that this tax is an unapportioned gross receipts tax upon interstate commerce, is likewise without merit. The Illinois Retailers' Occupation Tax Act (Ill.Rev.Stat., 1973, ch. 120, § 440, *et seq.*) imposes a tax on the privilege of selling tangible personal property at retail within the State of Illinois. While it is true that the ROTA is measured by "gross receipts" from sales, these sales—in order to be taxable under the Act—must occur within the taxing state.

The term "duly apportioned" was defined by this Court in *Complete Auto Transit* as "* * * [a tax which] does not undertake to tax any interstate activities carried on outside the state's borders . . ." (*Id.* 45 L.W. at 4261). The tax imposed by the State of Illinois meets this requirement. The State is not attempting to impose a tax upon the entire gross receipts of the corporation, nor is it attempting to impose a tax on any sale which was not made in Illinois. A tax is only imposed on the gross receipts generated from sales made within Illinois, where the purchasing railroads also took delivery of the goods inside of the State. Such a tax is duly apportioned and does not offend the commerce clause.

CONCLUSION

WHEREFORE for the foregoing reasons, the defendants respectfully pray that this Honorable Court dismiss the appeal or deny a Writ of Certiorari, or, in the alternative, that the decision of the Illinois Appellate Court be summarily affirmed.

Respectfully submitted,

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May 13, 1977

APPENDIX A

61008

INTERNATIONAL-STANLEY CORP.,
Plaintiff-Appellee,
Cross-Appellant,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, GEORGE E. MAHIN, as Director of Revenue of the State of Illinois, et al.,
Defendants-Appellants,
Cross-Appellees.

Appeal from the Circuit Court of Cook County.

Honorable Raymond S. Sarnow, Judge Presiding.

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

International-Stanley Corporation (plaintiff) paid certain assessments to the Illinois Department of Revenue (defendant), under protest. (Ill. Rev. Stat. 1975, ch. 127, par. 172.) The assessments related to the Retailers' Occupation Tax Act (Ill. Rev. Stat. 1975, ch. 120, par. 440 *et seq.*) and the Use Tax Act (Ill. Rev. Stat. 1975, ch. 120, par. 439.1 *et seq.*) On plaintiff's complaint seeking declaratory and injunctional relief, the circuit court held that those transactions in which the tangible personal property allegedly sold by plaintiff was attached to and became part of rolling stock moving in interstate commerce were not subject to either tax; but, conversely, that those transactions in which tangible personal property was attached to and made a part of rolling stock not moving in interstate commerce were subject to both types of taxes. Defendant appeals and plaintiff cross-appeals.

The pertinent facts appear from a stipulation entered into by the parties before trial and from testimony at trial. Plain-

tiff is a corporation engaged in the sale of products to railroads for use in connection with shipment of grain and other loose, unpackaged commodities in bulk. The plaintiff's products are grain doors, hopper car covers and the tools and accessories used in connection therewith. Grain doors are corrugated paper panels which are nailed across the inside of railroad boxcar doorways or used to line weakened inside walls of railroad freight cars. Hopper car covers are used to cover open-top railroad cars. In addition, plaintiff sells tools and accessories used in connection with the installation of these grain doors and hopper car covers.

The plaintiff's railroad customers furnish the grain doors, hopper car covers and accessories to bulk shippers. This protects open-car shipments from the elements and prevents loose products, such as grain, from spilling out of freight cars; thus enabling the common carrier railroads to "furnish safe and adequate car service" in compliance with federal law. 49 U. S. C. § 1(11)(1959).

Regarding shipment and delivery of the grain doors, the parties stipulated that after the doors are delivered to the railroad they are stored at various points along the railroad line pending redelivery to the shippers. These storage points are generally at or near the point where shipment of the bulk product commences. The grain doors are then delivered to shippers along with empty railroad freight cars.

The tariffs provide that the grain doors are to be installed by the shipper at its own expense. But, when the shipper so elects, the railroad will install the grain doors at the point of loading for a charge of $2.54 per car. It is also stipulated that the installation of the grain doors and accessories is "part of the process of loading the freight car." The doors and accessories are used only for one single continuous shipment and are not reused. Rates charged by the railroads for shipment are subject to prior approval by the Interstate Commerce Commission. Generally the rates, as approved, include a charge for the grain doors and accessories furnished to shippers by the railroads. In those few instances where a charge is not included in the rate, the railroad charges the shipper an additional fee for the grain doors and accessories. There was testimony at trial that this extra fee situation is limited to those instances where freight is carried "cross town" within the same terminal.

Plaintiff is a Nebraska corporation owned equally by International Paper Company, a New York corporation, and The Stanley Works, a Connecticut corporation, both of which are licensed to do business in Illinois. The grain doors are manufactured by International Paper at its plant in Illinois. The hopper car covers are manufactured at its plant in Arkansas. The accessories and tools are manufactured by Stanley Works at its Illinois plant. Upon completion of tools and accessories they are shipped to the International Paper plant in Illinois for storage pending further shipment. While thus in storage in Illinois, these items are included in plaintiff's inventory.

Plaintiff employs three salesmen and three engineers who work almost exclusively in Illinois. The salesmen generate and solicit orders. The engineers familiarize users of the grain doors with installation and investigate complaints about these items. The salesmen have no authority to accept orders from plaintiff's customer railroads. Instead, all customers prepare purchase orders which are sent directly to plaintiff's Nebraska office. Although plaintiff is under no duty to accept an order from a customer railroad, it has not rejected any such order within memory. The parties also stipulated that it is difficult to conceive of a situation in which an order would be rejected. Similarly, payment of plaintiff's invoices are made to plaintiff's Nebraska office where collection of accounts originates.

There are five distinct fact patterns regarding shipment and delivery of the grain doors and hopper car covers which are pertinent to this appeal:

1). The customer railroad takes delivery of the grain doors outside of Illinois and functional use of the doors commences outside of Illinois.[1]

2). The railroad takes delivery of the grain doors in Illinois where functional use begins.

3). The railroad takes delivery of the grain doors in Illinois but transports them out of the State where functional use will then begin.

4). The railroad takes delivery of the doors outside of Illinois but brings them into Illinois where functional use begins.

5). Hopper car covers, manufactured by International Paper in Arkansas, are delivered to railroads in Illinois to fill orders received by plaintiff.

The parties have agreed that the transactions in category number 1 are not subject to Illinois Retailers' Occupation Tax or Use Tax. As will later be detailed, categories 2, 3 and 4 form the issues concerning assessment of Retailers' Occupation Tax. Illinois Use Tax comes directly into question primarily with regard to the hopper car covers in category 5.

In September 1964, the Illinois Department of Revenue audited plaintiff's books and records. The Department subsequently notified plaintiff that it was liable for $208,335.96 under the Illinois Retailers' Occupation and Use Tax Acts, for the period from January 1, 1961 through January 31, 1964. Plaintiff paid this amount under protest. Various additional assessments were made and are to be included in the disposition made thereof by this opinion.

On November 13, 1964, plaintiff filed a complaint in the circuit court seeking an adjudication that its sales of grain doors were not subject to either Retailers' Occupation or Use Taxes. Plaintiff prayed injunctive relief restraining defendant from collecting such taxes from plaintiff. Plaintiff further prayed a

1. Functional use of the grain doors is deemed to begin when they are affixed to the freight cars prior to loading of the cars.

refund of all amounts paid. On November 16, 1964, the trial court enjoined defendant from disbursement and use of these payments and of any future amounts paid by plaintiff under protest in connection with its sales of grain doors and accessories.

In this court, defendant contends that plaintiff's sales of grain doors were subject to taxation under the Illinois Retailers' Occupation Tax Act; the application of that tax does not burden interstate commerce; the grain doors sold to the railroads by plaintiff were not "resold" by the railroads within the meaning of the Retailers' Occupation Tax Act; plaintiff's sales of grain doors and hopper car covers were subject to taxation under the Illinois Use Tax Act and plaintiff's sales were not exempt from taxation under the statutory exemption for rolling stock moving in interstate commerce.

Plaintiff urges that the trial court correctly held that the commerce clause of the United States Constitution prohibits taxation of those grain doors which become part of rolling stock moving in interstate commerce; the trial court erred in failing to hold that plaintiff was not a retailer at all; even assuming arguendo that plaintiff was a retailer, the trial court erred in failing to hold that plaintiff is not liable for Retailers' Occupation Taxes since it is not engaged in a retail occupation within Illinois; the trial court erred in failing to hold that the Interstate Commerce Clause forbids imposition of Retailers' Occupation Tax because plaintiff's receipts from interstate commerce would be taxed without apportionment between the portion of plaintiff's occupation conducted within Illinois and the portion conducted outside of the State; and the trial court erred in failing to hold that because of the rolling stock exemption in the Illinois Use Tax Act, the railroads incurred no use tax liability and plaintiff had no liability to collect use taxes from the railroads.

Both the Retailers' Occupation Tax Act (herein "ROTA", Ill. Rev. Stat. 1975, ch. 120, par. 440 *et seq.*) and the Use Tax Act, (herein "UTA", Ill. Rev. Stat., 1975, ch. 120, par. 439.1 *et seq.*) impose taxation only in the event of a retail sale. The

ROTA defines a sale at retail as a sale "for the purpose of use or consumption, and not for the purpose of resale * * *, for a valuable consideration." (Ill. Rev. Stat. 1975, ch. 120, par. 440.) The UTA definition of a retail sale is a sale "for the purpose of use, and not for the purpose of resale * * *, for a valuable consideration." (Ill. Rev. Stat. 1975, ch. 120, par. 439.2.) Plaintiff contends in its cross-appeal that it sells grain doors and related items to railroads for resale and not for use or consumption so that neither tax is applicable. This raises the initial issue as to whether plaintiff sells grain doors and accessories and hopper car covers at retail within the meaning of the statutes with particular reference to categories 2, 3, 4 and 5 above.

Plaintiff has cited a mass of authority regarding this issue. A discussion of all or even most of the cases cited would be impossible for reasons of space limitation. Our study has led us to conclude that the opinion of the Supreme Court of Illinois in *American Airlines* v. *Dept. of Revenue* (1974), 58 Ill. 2d 251, 319 N. E. 2d 28, is dispositive of plaintiff's contention in this regard. In *American Airlines* plaintiff purchased food from a supplier to be served to passengers in flight. The passengers were not charged additional sums for these meals beyond the cost of their tickets. The court stated that "a sale is one for use and consumption and not for resale, even though the purchaser transfers the commodity purchased, provided he does not transfer it for a direct and specific consideration." (58 Ill. 2d 251, 257, quoting from *Fefferman* v. *Marohn* (1951), 408 Ill. 542, 547, 97 N. E. 2d 785.) The Supreme Court thus held that, although passengers paid a fare which included a charge for meals, the airline was essentially selling transportation and there was no sale of meals by them within the meaning of the ROTA.

Similarly, in the instant action, the grain door covers and related items are furnished to the shippers by the railroads without additional charge but are included in the tariffs charged for railroad transportation. The railroads which purchase grain doors from plaintiff are essentially selling shipping services re-

garding which acquisition and disposition of the grain doors is merely incidental.

Plaintiff cites and depends upon Rule 50, par. 2, promulgated by the defendant. This rule provides, in effect, that where tangible personal property is sold to purchasers who transfer it to others, along with services for which a charge is made, this property is being sold or transferred for purposes of resale and thus the sellers or transferors are not liable under ROTA. Plaintiff reasons from this rule that it is merely transferring the grain doors to the railroads who in turn transfer them to the shippers, together with transportation service for which a charge is made, so that plaintiff should not be liable under ROTA. In our opinion, this Rule 50 is not applicable in the case before us. Rule 50, according to its title, is applicable to "vendors of tangible personal property employed for premiums, advertising, prizes, etc." We reject plaintiff's contention that it employs the grain doors for premiums, advertising, prizes or for any allied or similar use within the purview of Rule 50. No such situation is presented by the case before us. Our rejection is based in part upon *Boye Needle Co.* v. *Dept. of Revenue* (1970), 45 Ill. 2d 484, 259 N. E. 2d 278, where the court considered a situation regarding distribution of display racks by a distributor as premiums or rewards to various retailers who had purchased large quantities of merchandise. The court held that under Rule 50 the transfer of the premiums to the distributor from purveyors thereof was not subject to ROTA.

Plaintiff urges in this regard that the user of an item of tangible personal property is the person who utilizes the item in furtherance of its own business welfare and that in *American Airlines*, the airline, and not the passenger who ultimately consumed the meal, was the user of the food for purposes of ROTA. As the parties stipulated, railroads are required by federal law to furnish grain doors. Installation of the doors at the expense of the shipper does not alter the fact that the railroads use the doors in direct furtherance of their business activities quite

comparable to the manner in which airlines use meals served in flight.

We next consider whether plaintiff was engaged in a retail occupation in Illinois so that it is subject to taxation under the ROTA. There is an accepted legal distinction between performance of activities which constitute a retail occupation within Illinois and mere occurrence of a sale at retail within the State. (*Automatic Voting Mach. Corp.* v. *Daley* (1951), 409 Ill. 438, 447, 100 N. E. 2d 591.) Plaintiff correctly contends that mere solicitation of sales by agents located in Illinois is not sufficient to bring a seller within the ROTA. *Ex-Cell-O Corp.* v. *McKibbin* (1943), 383 Ill. 316, 50 N. E. 2d 505.

In defining solicitation, the courts have carefully examined the authority of the soliciting agent. (*Ex-Cell-O Corp.*, 383 Ill. 316, 322.) In *Ex-Cell-O Corp.*, plaintiff's sales agents did not have authority to accept or reject orders and "acceptance or rejection was not in any respect a perfunctory matter but involved an exercise of the engineering skill of plaintiff's employees and whether it was equipped to deliver such specified machines in the form and within the time stated in the order." (383 Ill. 316, 320.) Quite to the contrary, in the case before us, the parties have stipulated that, plaintiff's home office has the authority to reject orders solicited by its agents in Illinois, "but has not done so within memory, and it is difficult to conceive of a situation where it would do so." This stipulation, combined with the fact that plaintiff employs three engineers in Illinois to familiarize users of the grain doors with methods of installation and to investigate customer complaints, leads us to conclude that plaintiff's activities in Illinois are greater than the mere solicitation contemplated by the Supreme Court in *Ex-Cell-O* and similar cases.

In determining whether plaintiff is engaged in a retail occupation in Illinois, many factors must be considered. The Supreme Court recognized this in *Ex-Cell-O* where it stated (383 Ill. 316, 321, 322):

> "An occupation, the business of which is to sell tangible personal property at retail, is the composite of many activities extending from the preparation for, and the obtaining of, orders for goods to the final consummation of the sale by the passing of title and payment of the purchase price. It is obvious that such activities are as varied as the methods which men select to carry on retail business and it is therefore not possible to prescribe by definition which of the many activities must take place in Illinois to constitute it an occupation conducted in this State. Except for a general classification that might be made of the many retail occupations, it is necessary to determine each case according to the facts which reveal the method by which the business is conducted."

In addition to the work of plaintiff's salesmen and engineers within Illinois, the grain doors are manufactured in, shipped from, and, in many instances, delivered within this State.

The Illinois Supreme Court has looked beyond the form of an allegedly interstate transaction to find that it actually constituted an intrastate sale, taxable under the ROTA. In *Marshall & Huschart Co.* v. *Rev. Dept.* (1960), 18 Ill. 2d 496, 165 N. E. 2d 305, *cert. denied* 363 U. S. 820, and *Federal-Bryant Machinery* v. *Rev. Dept.* (1968), 41 Ill. 2d 64, 241 N. E. 2d 857, the plaintiff corporations structured their sales so that they were ostensibly interstate in nature, thereby avoiding payment under ROTA in Illinois. Depending upon the actuality of the situation rather than the externalities of corporate activity, the Supreme Court held plaintiffs liable for payment of the tax.

Likewise, in the instant action, two corporations which are licensed to do business in Illinois and which manufacture products within the State, have formed a subsidiary outside of Illinois which markets their products. If the actual corporate owners of plaintiff were each to sell its products directly to the railroads they would be liable under ROTA. By acting in concert through the use of plaintiff corporation, the actual owners thereof have attempted to structure their sales and corporate activities so that ROTA is not applicable.

The stipulated facts above cited demonstrate that the greater portion of activities in connection with retail sales to railroads by plaintiff took place within Illinois. Orders from customers within the State were actively solicited by plaintiff's salesmen domiciled within Illinois. All activities in connection with the actual filling of these orders such as manufacture, shipment and in many cases delivery took place within Illinois. Plaintiff maintained an inventory of tools and accessories in Illinois. The complete domination and management of plaintiff by its corporate owners is also apparent from the record. With one exception, all officers of plaintiff are officers or employees of its corporate owners. The directors of plaintiff are appointed by these same owners. Both of these corporate owners are licensed to do business in Illinois and have plants located within the State.

It is correct, as plaintiff points out in detail, that many of its activities were carried out in locations other than the State of Illinois, including maintenance of a business headquarters, billing, collection and the keeping of records; but, the proper criterion to be applied here is not so much the quantum of activities outside of the State as it is the nature, character and significance of activities of plaintiff within the State of Illinois directly related to the business of retail selling. It follows necessarily that plaintiff is a retailer in Illinois, subject to the provisions of ROTA.

Defendant next urges that the imposition of ROTA upon plaintiff's sales of grain doors and accessories does not offend the Commerce Clause of the federal constitution. Plaintiff answers this argument by raising two contentions. First, with regard to categories 2, 3 and 4, plaintiff argues that ROT is an impermissible, unapportioned tax on gross receipts from interstate commerce. Plaintiff's second contention is that taxation of its sales in category 3 is prohibited by the Commerce Clause because these grain doors are used in interstate commerce outside of the State.

The Illinois Supreme Court has held that "when a purchaser in a sale in Illinois takes delivery of the goods in Illinois, the sale is not in interstate commerce and is taxable under State law, though the purchaser immediately takes the goods out of Illinois for use outside of Illinois." (*American Airlines* v. *Dept. of Revenue* (1974), 58 Ill. 2d 251, 259, 319 N. E. 2d 28.) As shown above, plaintiff was engaged in a retail occupation in Illinois at the time in question here, and the deliveries of the grain doors in categories 2 and 3 occurred within the State. The ROTA assessment which plaintiff has challenged does not tax its gross receipts from all sales, but only from those sales arising out of its activities as an Illinois retailer. The fact that plaintiff conducts some of its business activities outside the State does not preclude defendant from taxing these sales of grain doors and accessories in categories 2 and 3 which took place within Illinois. *Norton Co.* v. *Dept. of Revenue* (1950), 405 Ill. 314, 90 N. E. 2d 737, reversed in part, 340 U. S. 534, 95 L. Ed. 517, 71 S. Ct. 377, modified, 409 Ill. 216, 99 N. E. 2d 346.

The requirement that a local incident occur to bring a sale within the taxing power of a state (*Norton Co.* v. *Dept. of Revenue* (1951), 340 U. S. 534) was recognized by the Illinois Supreme Court in *American Airlines*. Therefore, we find that sales in category 4 are not subject to ROTA because they were delivered to the purchasing railroads outside the State of Illinois. We will discuss the application of UTA to these transactions in a later portion of this opinion.

In its argument regarding category 3, wherein grain doors and accessories were delivered to purchasing railroads within Illinois and taken outside of the State before functional use began, plaintiff urges this court to disregard an established line of cases concerning the constitutionality of ROTA as applied to sales of various commodities to railroads for use outside of Illinois. (*Pressed Steel Car Co.* v. *Lyons* (1955), 7 Ill. 2d 95, 129 N. E. 2d 765; *Superior Coal Co.* v. *Dept. of Revenue*

(1954), 4 Ill. 2d 459, 123 N. E. 2d 713 and *Moffat Coal Co.* v. *Daley* (1950), 405 Ill. 14, 89 N. E. 2d 892.) Plaintiff argues that these cases are inapplicable here because the grain doors and accessories are used by the shippers rather than by the railroads. As shown above, the fact that the shippers themselves either install the grain doors or pay the railroad for such installation does not affect our conclusion that the grain doors are used by the railroads to promote their own business welfare by enabling them to provide appropriate cars for shipping as required by federal law.

The fact that the grain doors are sold and delivered to railroads in Illinois for use out of the State does not necessarily make the sales transaction interstate so as to render application of ROTA unconstitutional. (*Moffat Coal Co.*, 405 Ill. 14, 16.) Furthermore, the Supreme Court has rejected the argument that the role of a railroad as a carrier when it carries goods consigned to itself is separate and divorced from its role as a purchaser of such goods. (*Pressed Steel Car Co.*, 7 Ill. 2d 95, 101.) We conclude that imposition of the tax by defendant on sales in category 3 is within constitutional requirements.

We next consider whether Illinois UTA applies to plaintiff's sales of grain doors and accessories in category 4 and to sales of hopper car covers in category 5. We need not reach the question of whether UTA is applicable to transactions in categories 2 and 3 because the ROTA is applicable to those sales and the parties have stipulated that "if plaintiff is held liable for the Illinois retailers' occupation or use tax on account of its 'taxable' sales of grain doors and accessories during the First [Assessment] Period it has already paid the use taxes to which the proposed assessments * * * relate." Therefore, plaintiff would in no event be liable for additional or double payments due to use tax liability for those same sales.

At all times pertinent to this litigation, the UTA included an exception for:

> "the use, in this State, of tangible personal property which is acquired outside the State and which is moved into this State for use as rolling stock moving in interstate commerce; * * *."

(Ill. Rev. Stat. 1965, ch. 120, par. 439.3.) In July, 1965, the legislature defined the term "acquired outside this state" as follows:

> "'Acquired outside this State', whenever used in this Section, in addition to its usual and popular meaning, shall include the delivery, outside Illinois, of tangible personal property that is purchased in this State and delivered from a point in this State to the point of delivery outside this State."

(Ill. Rev. Stat. 1965, ch. 120, par. 439.3.) Defendant correctly concedes that this exception applies to grain doors and accessories in category 4 which were delivered to the purchasing railroads outside of Illinois, even though they might later be brought into the State for use.

Plaintiff further contends that the rolling stock exception to the statute applies to the hopper car covers delivered to railroads in Illinois from Arkansas. To support its argument, plaintiff suggests that the 1967 amendment to the UTA which deleted the requirement that the exempt items be acquired outside of the State, was intended to apply retroactively. We reject plaintiff's argument because Illinois statutes are prospective in their operation and will not be construed to be retroactive unless the statutory language is so clear that it cannot be construed otherwise. (*People* v. *Lindheimer* (1939), 371 Ill. 367, 21 N. E. 2d 318.) Plaintiff's reliance on *Johnson* v. *Marshall Field & Co.* (1972), 8 Ill. App. 3d 937, 291 N. E. 2d 310, affirmed 57 Ill. 2d 272, 312 N. E. 2d 271, in this regard is misplaced. In that case, the court considered an amendment to a taxing statute in construing the legislature's intent in enacting the original statute. However, the statutory amendment specifically stated what the legislature had intended "since the inception of" the statute in question. (See 8 Ill. App. 3d 937, 940.) The UTA contains no similar language. Therefore, we

find that the rolling stock exemption did not apply to the sales in category 5 and that plaintiff was properly assessed for use tax in connection with those sales.

We reach the following results with regard to the various categories of sales set out above. As above shown, transactions in category number 1 are not subject to ROTA or to UTA. Sales in categories 2 and 3 may be taxed under ROTA. Sales in category 4 are exempt from taxes under both ROTA and UTA. Sales in category 5 are taxable only under UTA. These guidelines should enable the trial court to determine the merits of each assessment attempted against plaintiff. The final judgment order entered July 24, 1974, is reversed and the cause is remanded with directions that further proceedings be had and additional orders be entered herein not inconsistent with the views above expressed and the conclusions reached.

REVERSED AND REMANDED WITH DIRECTIONS.

BURKE, *J.*, and O'CONNOR, JR., *J.*, concur.

APPENDIX B

Ill. Rev. Stat., 1973, ch. 120, § 440:

"Sale at retail" means any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use or consumption, and not for the purpose of resale in any form as tangible personal property to the extent not first subjected to a use for which it was purchased, for a valuable consideration.

* * *

"Sale at retail" shall be construed to include any transfer of the ownership of or title to tangible personal property to a purchaser, for use or consumption by any other person to whom such purchaser may transfer the tangible personal property without a valuable consideration, and to include any transfer, whether made for or without a valuable consideration, for resale in any form as tangible personal property:

* * *

"Selling price" or the "amount of sale" means the consideration for a sale valued in money whether received in money or otherwise, including cash, credits, property, other than as hereinafter provided, and services, but not including the value of or credit given for traded-in tangible personal property where the item that is traded-in is of like kind and character as that which is being sold, and shall be determined without any deduction on account of the cost of the property sold, the cost of materials used, labor or service cost or any other expense whatsoever.

Supreme Court, U. S.
FILED
MAY 19 1977
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1202

INTERNATIONAL-STANLEY CORPORATION,
A NEBRASKA CORPORATION,
Appellant,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, GEORGE E. MAHIN AS DIRECTOR OF REVENUE OF THE STATE OF ILLINOIS, AND ALAN J. DIXON AS TREASURER OF THE STATE OF ILLINOIS.
Appellees.

ON APPEAL FROM THE APPELLATE COURT
OF ILLINOIS, FIRST DISTRICT

APPELLANT'S BRIEF OPPOSING THE MOTION TO DISMISS OR AFFIRM

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May 18, 1977

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I.

Although Appellees Misdirected the Appellate Court of Illinois on the Point, Neither Tax Evasion Nor Tax Avoidance Has at Any Time Been an Issue in This Case

Appellees' Statement Of The Case asserts that the Appellate Court upheld the Illinois tax "despite plaintiff's corporate structure." Appellees then commence their Argument with references to tax avoidance and implications that somehow Appellant is attempting to escape a just tax by technicalities.

At no time in the long history of this litigation has there ever been an issue concerning tax evasion or avoidance, technicalities of acceptance of orders or locus of sales, or the abstract jurisdiction of Illinois to tax Appellant. Nothing in the Trial Court's opinion for Appellant referred to or even suggested the existence of any such issues.

Those non-issues were first introduced into this case by Appellees' Brief filed with the Appellate Court [Brief For Defendants-Appellants, Cross-Appellees, p. 13]:

> "So, not only does plaintiff engage in substantial business activities within the state, it also has substantial local business connections and the extent of these relationships clearly indicates that the corporate fiction should not be sufficient to relieve plaintiff of the obligation to pay duly imposed local taxes on the revenues it has derived from local operations. Plaintiff should not be permitted to channel retail sales of products manufactured in Illinois by the parent corporations through a foreign subsidiary in order to avoid payment of the Illinois retailers' occupation tax."

Because neither nexus nor jurisdiction to tax was ever an issue in this case, the only apparent purpose of such language was to route the Appellate Court down the paths of irrelevance.

The attempt succeeded. During oral argument in the Appellate Court, Counsel for Appellant [Appellee in that Court] attempted to rebut the State's reiterated inference of tax evasion or avoidance by announcing that the identity of the taxpayer was not relevant and that the result in the case should be identical with what it would be if International Paper Company or The Stanley Works were the taxpayers, *to wit*, the tax would still unconstitutionally burden interstate commerce.

Notwithstanding Appellant's attempt to keep the case on course, the Appellate Court wrote [Jurisdictional Statement, p. A8 at A16]:

> "* * * If the actual corporate owners of Plaintiff were each to sell its products directly to the railroads they would be liable under ROTA. By acting in concert through the use of plaintiff corporation, the actual owners thereof have attempted to structure their sales and corporate activities so that ROTA is not applicable."

Appellant respectfully suggests that the Appellate Court's failure deliberately to consider the many opinions of this Court holding taxes like those assessed here to be violative of the Commerce Clause [Jurisdictional Statement, pp. 12-18] was due, in large part, to the "tax avoidance" coloration which Appellees unfairly injected into the proceedings before the Appellate Court.

II.

Appellees' Assertion That the Appellate Court Did Not Base Its Decision Upholding the Tax Upon The Fact That Grain Doors Were "Delivered" in Illinois Is Incorrect

Appellees commence their argument with an assertion that the Appellate Court did not reverse the trial court and uphold the tax on the theory that the grain doors were "delivered" in Illinois. The logic of Appellees' argument is not readily comprehensible but it is clear that Appellees are dead wrong in their assertion.

The Appellate Court divided Appellant's sales of grain doors into the following four categories [Jurisdictional Statement, p. A8 at A11]:

> "1) The customer railroad takes delivery of the grain doors outside of Illinois and functional use of the doors commences outside of Illinois.
>
> 2) The railroad takes delivery of the grain doors in Illinois where functional use begins.
>
> 3) The railroad takes delivery of the grain doors in Illinois but transports them out of the State where functional use begins.
>
> 4) The railroad takes delivery of the doors outside of Illinois but brings them into Illinois where functional use begins."

The Appellate Court held that gross receipts from sales of grain doors in categories 1) and 4) were not taxable but that gross receipts from sales of grain doors in categories 2) and 3) were. Categories 1) and 3) were each concerned with grain doors which were functionally used in interstate commerce outside of Illinois. The tax results varied because of the place of "delivery," either within Illinois (taxable) or outside-of-Illinois (non-taxable).

III.

The Appellate Court's Conclusion That "Delivery" Took Place Within Illinois Is Based Upon an Illinois Rule Which Is Not Relevant to a Correct Decision of the Commerce Clause Question

The trial court held that imposition of the Illinois Retailers Occupation Tax would unconstitutionally burden interstate commerce to the extent it taxed Appellant's gross receipts from sales of grain doors destined for outside-of-Illinois locations. After reviewing the legislative history of a specific "rolling stock moving in interstate commerce" exemption (which had always been in the Illinois Use Tax Act but did not become part of the Illinois Retailers' Occupation Tax Act ["ROTA"] until 1967 [Jurisdictional Statement, p. 11]), the trial court based its decision on the ROTA's generic "interstate commerce" exemption from tax liability [Jurisdictional Statement, p. A1 at A4-A5].

The trial court did not ground its decision to any extent upon a finding that "delivery" of the grain doors did or did not take place within Illinois; indeed there is nothing in the record to support the Appellate Court's finding of "delivery" [Jurisdictional Statement, p. A23 at A27-A28, paragraph 4.3]. The Appellate Court overruled the trial court's holding that the Commerce Clause precluded imposition of the tax with but little discussion [Jurisdictional Statement, p. A8 at A19]:

> "The fact that the grain doors are sold and delivered to railroads in Illinois for use out of the State does not necessarily make the sales transaction interstate so as to render application of ROTA unconstitutional. (*Moffat Coal Co.*, 405 Ill. 14, 16, 89 N.E.2d 892.) Furthermore, the Supreme Court has rejected the argument that the role of a railroad as a carrier when it carries goods consigned to itself is separate and divorced from its role as a purchaser of such goods (*Pressed Steel Car Co.*, 7 Ill.2d 95, 101, 129 N.E.2d 765.) We conclude that imposition of the tax by defendant on sales in category 3 is within constitutional requirements."

The *Pressed Steel Car* case concerned railroad ties which had been sold by Illinois retailers to be used by their railroad customers in their own businesses. The railroads argued that there had been no delivery to them within Illinois because they had received the ties "as carriers" rather than "as purchasers," an argument never made in this case. There was no reason whatever—and no practical assurance—that the railroads after receiving the ties within Illinois would not have used them to repair Illinois roadbeds. The Illinois Supreme Court rejected the Commerce Clause argument [7 Ill. 2d 95 at 98-99]:

> "The argument against the tax is based upon the commerce clause of the Federal constitution, and stresses the intention of the seller and the purchaser that the goods sold should be shipped to a destination outside of Illinois, and the fact that the goods were actually so shipped. It appears to be settled, however, that a transaction by which a purchaser buys goods which are delivered to him within the taxing State may properly measure a tax, even though both parties know that the goods are purchased for use outside of the State, and they are so used. *Superior Oil Co.* v. *Mississippi*, 280 U.S. 390; * * *."

In this Court's *Superior Oil Company* case, gasoline had been sold by a Mississippi oil company to Mississippi shrimp packers and delivered to them within Mississippi at which time the purchasing packers could do as they liked with the gasoline. The packers then carried the gasoline to Louisiana. In what was a transparent attempt to avoid Mississippi taxes by elevating

form over substance, the packing company would turn over to the selling oil company a so-called "bill of lading" which purported to show that the gasoline was to be transported by the packing company to a point outside of Mississippi. A Louisiana "neighborhood" rather than any specific point was named as destination for alleged redelivery of the gasoline there into the tanks of fishing boats. Mr. Justice Holmes, writing for the Court, recognized the decisive fact as being the clear attempt of the purchaser to convert an intrastate purchase into an interstate transaction [280 U. S. 390 at 394-395, 396]:

> "* * * The document seems to have had no other use than, as the Supreme Court of Mississippi said, to try to convert a domestic transaction into one of interstate commerce. There was no consignee at the point of destination. The goods were delivered to the so-called consignee before they started, and were in its hands throughout. There was no point of destination for delivering of the oil but merely a neighborhood in which the packers that had bought it and already held it expected to sell it again. The document hardly can affect the case, because it is 'not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause' * * * at least when the contract achieves nothing else.
>
> "* * * We may admit that this case is near the line.
>
> "* * * But here the gasoline was in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes. If it had bought bait for fishing that it intended to do itself the purchase would not have been interstate commerce because the fishing grounds were known by both parties to be beyond the State line. A distinction has been taken between sales made with a view to a certain result and those made simply with indifferent knowledge that the buyer contemplates that result. * * * The only purpose of the vendor here was to escape taxation. * * * It is a matter of proximity and degree as to which minds will differ, but it seems to us that the connection of the seller with the steps taken by

> the buyer after the sale was too remote to save the seller from the tax. Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here."

There is at least one essential difference between this case and *Superior Oil*. There a taxpayer attempted to avoid legitimate state taxes by elevating form over substance, by making transactions appear to be different from what they really were. Here the question is whether just the contrary is true: do the tax collectors rather than the taxpayer seek to elevate form—in this case "delivery"—over substance in order to justify a tax on interstate commerce?

IV.

Appellees Improperly Seek to Justify the Illinois Retailers' Occupation Tax Act's Lack of Apportionment by Treating It "As If" It Imposed a Sales Tax Rather Than an Occupational Tax

The activity taxed by Illinois' ROTA is the "business of selling tangible personal property at retail" [Jurisdictional Statement, p. A43]. The Appellate Court conceded that most of Appellant's activities essential to the conduct of its retail occupation—"including maintenance of a business headquarters, billing, collection, and the keeping of records" [Jurisdictional Statement, p. A8 at A17]—were carried out in locations outside of Illinois.

If we were concerned with a sales tax rather than an occupational tax, there would be validity to Appellees' theory of apportionment; in such a case the activities taxed—sales within Illinois—would be apportioned exactly to what took place within Illinois, the making of sales in Illinois.

Appellees repeat several times in their Motion To Dismiss Or Affirm their confusion between a sales tax and an occupational tax [Motion To Dismiss Or Affirm pp. 6, 7]:

> "* * * A tax on local sales has never been held to be such an 'integral' part of commerce [as to constitute an impermissible burden on interstate commerce]. * * * [S]ince the purchasing railroads took delivery of the goods (grain doors) inside the State, the sale was not made in interstate commerce. * * * Since the sales in question in the instant case were not made in interstate commerce, they were properly taxable by the State of Illinois * * *."

It is a fundamental principle of constitutional law that this Court will not review a state tax case "as if" the state had enacted a different taxing statute from the one under which it in fact assessed a tax in the particular case to be decided. *Evco* v. *Jones*, 409 U. S. 91, 93, 94; *McLeod* v. *Dilworth Co.*, 322 U. S. 327, 330, 331.

WHEREFORE, Appellant respectfully requests that probable jurisdiction be noted for the reasons set forth in its Jurisdictional Statement.

Respectfully submitted,

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May 18, 1977